(2)

Supreme Court, U.S.
FILED

04 805 DEC 14 2004

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

TEXACO, INC.,

Petitioner,

v.

FOUAD N. DAGHER, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

ROBERT A. MITTELSTAEDT
CRAIG E. STEWART
(Counsel of Record)
MARTHA BOERSCH
JONES DAY
555 California Street, 26th Floor
San Francisco, CA 94104
(415) 626-3939

JOE SIMS
LOUIS K. FISHER
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

Counsel for Petitioner

QUESTION PRESENTED

Whether it is *per se* illegal concerted action under Section 1 of the Sherman Act for an economically integrated joint venture to set the selling price of its own products.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the Ninth Circuit were Fouad N. Dagher; Bisharat Enterprises, Inc.; Alfred Buczkowski; Esequiel Delgado; Mahwash Farzaneh; Nasser El-Radi; G.G.&R. Petroleum, Inc.; H.J.F. Inc.; Kaleco Co.; Carlos Marquez; Sami Merhi; Edgardo R. Parungao; Ron Abel Serv. Center, Inc.; Gullermo Ramirez; Jerry's Shell Serv. Center, Inc.; Leopoloo Ramirez; Nazar Sheibaini; Sitara Management Corporation; Tinsel Enterprises, Inc.; Quang Truong; Steven Ray Vezerian; Los Feliz Shell, Inc.; Nassim Hanna; Saudi Refining, Inc.; Texaco, Inc.; Shell Oil Company; Motiva Enterprises LLC; Equilon Enterprises LLC; Equiva Trading Company; and Equiva Services LLC.

Pursuant to Supreme Court Rule 29.6, petitioner Texaco, Inc. states that it is a wholly owned subsidiary of ChevronTexaco Corporation. ChevronTexaco Corporation has no parent company, and no publicly held company owns 10% or more of ChevronTexaco Corporation's stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

OPINIONS BELOW 1

JURISDICTION 1

STATUTE INVOLVED 1

STATEMENT OF THE CASE 1

A. The Joint Ventures 2

B. This Lawsuit 4

C. The Ninth Circuit's Divided Decision 5

REASONS FOR GRANTING THE WRIT 7

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CIRCUIT CONFLICT AS TO THE PROPER TREATMENT UNDER SECTION 1 OF THE SHERMAN ACT OF A JOINT VENTURE ENTITY'S OPERATION OF ITS OWN BUSINESS. 10

A. The Ninth Circuit's Ruling That Section 1 Applies Is At Odds With The Decisions Of This Court And Other Circuits. 10

B. The Circuits Are Split Over The Circumstances In Which, Assuming Section 1 Applies, The Pricing Decisions Of A Joint Venture May Be Subjected To *Per Se* Treatment 13

II. THE PROPER ANTITRUST TREATMENT OF A JOINT VENTURE'S OPERATIONAL DECISIONS IS AN IMPORTANT QUESTION ON WHICH THIS COURT'S GUIDANCE IS URGENTLY NEEDED. 15

TABLE OF CONTENTS (cont'd)

Page

III. THE NINTH CIRCUIT'S RULING WAS FUNDAMENTALLY MISTAKEN. 18

A. A Joint Venture Entity's Operation Of Its Own Business Is Single Firm Conduct, Not Concerted Action. 18

B. The Ninth Circuit's Ruling That *Per Se* Treatment May Be Applied Conflicts With This Court's Decisions And Basic Antitrust Principles. 22

CONCLUSION 26

TABLE OF AUTHORITIES

Page

Cases

Addamax Corp. v. Open Software Found., 152 F.3d 48 (1st Cir. 1998) 12

Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332 (1982) 5, 11, 12, 25

Augusta News Co. v. Hudson News Co., 269 F.3d 41 (1st Cir. 2001) 13, 14

Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1 (1979) 8, 22, 23, 24

Chicago Prof'l Sports Ltd. P'ship v. NBA, 95 F.3d 593 (7th Cir. 1996) 11, 15

Citizen Publ'g Co. v. United States, 394 U.S. 131 (1969) 25

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) 7, 10, 11, 19

FTC v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986) 22

Fraser v. Major League Soccer, L.L.C., 284 F.3d 47 (1st Cir. 2002) 14

Mt. Pleasant v. Associated Elec. Coop., 838 F.2d 268 (8th Cir. 1988) 11, 12

NCAA v. Bd. of Regents, 468 U.S. 85 (1984) 8, 23, 24

National Bancard Corp. v. Visa U.S.A., 779 F.2d 592 (11th Cir. 1986) 14

Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985) 7, 8

Nurse Midwifery Assocs. v. Hibbett, 918 F.2d 605 (6th Cir. 1990) 12

TABLE OF AUTHORITIES (cont'd)

Page

Polk Bros., Inc. v. Forest City Enters.,
776 F.2d 185 (7th Cir. 1985) 15, 16

Rothery Storage & Van Co. v. Atlas Van Lines,
792 F.2d 210 (D.C. Cir. 1986) 14, 15

Timken Roller Bearing Co. v. United States,
341 U.S. 593 (1951) 25

United States v. Penn-Olin Chem. Co.,
378 U.S. 158 (1964) 18

United States v. Visa U.S.A.,
344 F.3d 229 (2d Cir. 2003), *cert. denied*,
125 S. Ct. 45 (2004) 15, 18, 19

Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 124 S. Ct. 872 (2004) 9

Statutes

15 U.S.C. § 1 ..... 1, 10, 18, 19, 20, 21, 22

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 4

Other Authorities

VII Phillip Areeda & Herbert Hovenkamp,
Antitrust Law (2003) 12, 17, 19, 20

Howard H. Chang, *et al.*, *Some Economic Principles for Guiding Antitrust Policy Towards Joint Ventures*, 1998 Colum. Bus. L. Rev. 223 17

Federal Trade Commission & Department of Justice Antitrust Division, *Antitrust Guidelines for Collaborations Among Competitors*, 4 Trade Reg. Rep. (CCH) ¶ 13,161 (2000) 12, 13, 16

E. Gelhorn & W. Todd Miller, *Competitor Collaboration Guidelines—A Recommendation*,
42 Antitrust Bull. 851 (1997) 17

TABLE OF AUTHORITIES (cont'd)

Page

XI Herbert Hovenkamp, *Antitrust Law* (1998) 24

XIII Herbert Hovenkamp, *Antitrust Law*
(2d ed. 2005) 8, 25

Thomas A. Piraino, Jr., *A Proposed Antitrust Approach to Collaborations Among Competitors*,
86 Iowa L. Rev. 1137 (2001) 16, 17

Thomas A. Piraino, Jr., *Reconciling Competition and Cooperation: A New Antitrust Standard for Joint Ventures*, 35 Wm. & Mary L. Rev. 871 (1994) 8

Jon G. Shepherd, Editor's Note, *Symposium: Antitrust Scrutiny of Joint Ventures*,
66 Antitrust L.J. 641 (1998) 16

Neal R. Stoll & Shepard Goldfein, *Catch 22 for Joint Ventures*, N.Y.L.J., Aug. 17, 2004 , at 3 18

Gregory J. Werden, *Antitrust Analysis of Joint Ventures: An Overview*, 66 Antitrust L.J.
701 (1998) 16, 17, 20

PETITION FOR A WRIT OF CERTIORARI

Petitioner Texaco, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-33a) is reported at 369 F.3d 1108. The opinions of the district court (Pet. App. 34a-69a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 2004. Petitioner's timely petition for rehearing and rehearing en banc was denied on September 15, 2004. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal.

STATEMENT OF THE CASE

This case presents the important, recurring question of when and to what degree the operational decisions of a single entity formed as a joint venture carrying out its own business are subject to scrutiny under Section 1 of the Sherman Act. In an opinion by Judge Reinhardt (over the dissent of Judge Fernandez), the Ninth Circuit ruled not only that Section 1 applies, but that it could be *per se* illegal for a joint venture entity to set the selling price of its own products. This ruling sharply conflicts with decisions of this Court and other courts of appeals, which have recognized that a single entity's operation of its business is not subject to Section 1 analysis at all, let alone to *per se* condemnation, and that this conclusion does not change simply because the

entity was formed as a joint venture combining the businesses of two former competitors. The Ninth Circuit's decision creates a dangerous precedent that will have a significant adverse impact on joint ventures that operate within the Ninth Circuit and will discourage the formation of legitimate, efficiency-enhancing joint ventures that are vital to the national economy. Any such venture that does business anywhere in the broad geographic reach of the Ninth Circuit, as most significant businesses do, now faces the threat of expensive litigation and treble damage liability for routine business conduct that has been and should be viewed as entirely lawful.

Because the Ninth Circuit's decision is so starkly contrary to common sense and basic antitrust principles—and because it significantly impairs the clear, predictable, and nationally uniform rules that are critical to the efficient operation of our economy—this Court should grant certiorari to correct this error, resolve the conflict in decisions, and bring needed certainty to this important area of antitrust law.

A. The Joint Ventures

In 1996, Shell and Texaco began discussing the formation of a new company to consolidate their domestic gasoline refining and marketing operations. After months of study, they concluded that the consolidation could result in reduced costs and increased efficiencies that would save approximately $800 million per year. A single new company would allow refineries located close together to share inputs and transportation costs, allow increased use of company-owned pipelines, and permit more effective advertising and sales promotion.

In 1998, the discussions culminated in the complete integration of the gasoline refining and marketing businesses of Shell and Texaco in the United States. The assets that Shell and Texaco contributed included twelve refineries, twenty-three lubricant plants, two research laboratories, 22,000 branded service stations, over 24,000 miles of

pipeline, 107 terminals, and approximately 24,000 employees. The new businesses formed in the integration (named Equilon and Motiva[1]) also received the exclusive rights to market gasoline in the United States under the Shell and Texaco brands.

The result of this transaction was that Shell and Texaco exited the gasoline refining and marketing business in the United States. They transferred the relevant assets to the joint ventures and signed non-competition agreements that prohibited them from competing with the joint ventures. Shell and Texaco thus became merely the owners of the new entities that had the sole rights to refine and market Shell and Texaco gasoline. The formation of these companies was effectively a merger of Shell's and Texaco's former gasoline refining and marketing businesses, and Shell and Texaco stood in the same relation to the new entities as do shareholders to a corporation.

Reflecting the complete integration of their former businesses, the profits Shell or Texaco could earn from the entities were no longer derived from the quantity of any specific brand the entities sold. Instead, Shell's and Texaco's gains or losses depended on the overall profitability of the entities, and were divided in proportion to the assets each company contributed at formation. Thus, neither Shell nor Texaco had a specific interest in the price charged for the particular brand sold by the ventures. Following their formation, the entities charged the same price in any particular region for Shell-branded and Texaco-branded gasoline.

---

[1] Because Texaco had previously formed a venture with Saudi Refining, Inc. that included its refining and marketing assets in the eastern half of the country, this new combination took the form of two separate ventures—one (Motiva) covering the eastern part of the country and including SRI, and the other (Equilon) involving just Shell and Texaco covering the western half of the United States.

The Federal Trade Commission and the attorneys general of four western States comprehensively reviewed the effective merger of these businesses for compliance with the antitrust laws. Each of these antitrust regulators concluded that, with certain divestitures, the combination did not violate either Section 7 of the Clayton Act or Section 1 of the Sherman Act, and allowed the transaction to proceed. Consent decrees were entered to that effect in 1997 and 1998. The consent decrees reflected that the ventures achieved significant economic efficiencies. As the Ninth Circuit acknowledged, "[t]here is a voluminous record documenting the economic justifications for creating the joint ventures." Pet. App. 4a.

B. This Lawsuit

In 1999, service station owners who bought gasoline from Equilon filed this lawsuit under Section 1 of the Sherman Act. Without challenging Equilon's legitimacy or its right to produce and sell gasoline, the plaintiffs alleged that it was *per se* illegal price-fixing for Equilon to charge the same price for the Shell brand as for the Texaco brand.[2] The plaintiffs (understandably) disavowed any attempt to prove a violation of Section 1 under a "rule of reason" analysis, which would have required that they demonstrate that Equilon's pricing decision actually had anticompetitive effects in some relevant market. Instead, they sought to prevail solely on the basis that Equilon's pricing of its own gasoline could be held unlawful without any analysis of its actual competitive impact.

The district court, which had jurisdiction under 28 U.S.C. § 1331, granted the defendants' motion for summary

---

[2] The plaintiffs asserted a similar claim against Motiva, but the district court dismissed that claim, and the Ninth Circuit affirmed, because none of the plaintiffs had purchased from Motiva. *See* Pet. App. 34a-45a; *id.* at 10a-12a. The only claims at issue are therefore those related to Equilon.

judgment. The court concluded that Equilon was bona fide and could not reasonably be viewed as a sham designed to disguise an ulterior anticompetitive purpose. Pet. App. 54a-66a. The district court further ruled that it did not violate the antitrust laws for this bona fide single entity to price its own products "[l]ike any other business." *Id.* at 63a. The court found it irrelevant that Equilon charged the same price for the Shell and Texaco brands. As the court explained: "Whether Equilon and Motiva charge the same or different prices for both brands, each literally 'fixes' a price where [Shell and Texaco] formerly set prices independently. Yet they and every other joint venture must, at some point, set prices for the products they sell." *Id.* at 52a-53a. Holding that it is illegal for a joint venture to fix the prices of its various brands would "act as a *per se* rule against joint ventures between companies that produce competing products." *Id.* at 54a.

C. The Ninth Circuit's Divided Decision

In a split decision, the Ninth Circuit reversed. The majority (Reinhardt and Rawlinson, JJ.) held that Equilon's decision to charge the same price for the Shell and Texaco brands was *per se* illegal unless the defendants could show that that particular pricing decision was "reasonably necessary" to achieve the anticipated efficiencies that led to Equilon's creation. Pet. App. 21a.

The majority acknowledged that, "for some purposes at least," joint ventures that consist of a true pooling of assets and sharing of risks are to be considered "single firms competing with other sellers in the market." Pet. App. 16a (quoting *Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 356 (1982)). The majority further acknowledged that Equilon involved such a "collective assumption of risk and resource pooling." Pet. App. 5a. But the majority concluded that Equilon's integrated nature did not prevent application of Section 1 to Equilon's pricing of its own products because there supposedly was evidence that Shell and Texaco had

agreed "in advance" that, once Equilon was formed, it would charge the same price for each brand. *Id.* at 19a n.11. To the majority, this meant that the pricing decision "was not a decision made by a single economic entity—it was a decision made by competitors." *Id.*

Applying Section 1, the majority concluded that the legality of Equilon's pricing depended on whether "setting one, unified price for both the Texaco and Shell brands of gasoline instead of setting each brand's price independently on the basis of normal market factors . . . is reasonably necessary to further the aims of the joint venture." *Id.* at 21a. If not, the court held, it might be simple naked price-fixing, and thus *per se* illegal.

Applying its narrow focus on Equilon's actual pricing strategy, the majority concluded that the evidence did not establish the requisite necessity because, in the court's view, the defendants did not view unified pricing of the two brands as critical to the efficiencies and anticipated cost savings from Equilon's creation. *Id.* at 23a. And the court rejected the argument that businesses must have the freedom to choose the prices at which they will sell their products without being second-guessed by the courts. It asserted that that argument "proves too much" because it would permit companies to "create joint ventures as fronts for price-fixing"—although the court did not suggest that Equilon was a sham or anything other than a bona fide single entity merely pricing the products it produced, owned, and sold. *Id.* at 26a. The majority dismissed as irrelevant whether Equilon's pricing strategy had any actual competitive consequences. Having labeled Equilon's price-setting as "price-fixing," the majority held that the *per se* rule forbids any such inquiry.

Judge Fernandez dissented. He began with the undisputed premise that there was "no doubt that each of the new entities is a true, bona fide, economically integrated joint venture." *Id.* at 29a. He concluded that "nothing more

radical is afoot than the fact that an entity, which now owns all of the production, transportation, research, storage, sales and distribution facilities for engaging in the gasoline business, also prices its own products." *Id.* at 31a-32a. Judge Fernandez rejected the majority's assertion that liability depended on whether the defendants could show that Equilon's specific pricing strategy was "essential [or] 'reasonably ancillary to the legitimate cooperative aspects of the venture.'" *Id.* at 31a. Instead, it was enough that Equilon needed "to price its own goods." *Id.* at 32a. As he stated, "[w]hat could be more integral to the running of a business than setting a price for its goods and services?" *Id.* Because Equilon was thus a "separate entity" entitled to price its own products, it was irrelevant that it "decided to price them the same, as any other entity could." *Id.* at 31a, 32a. The result of the majority's ruling, Judge Fernandez concluded, was that bona fide joint ventures would be subject "to the severe sting of antitrust liability" simply for conducting themselves on the same basis as any other "true business." *Id.* at 32a.

REASONS FOR GRANTING THE WRIT

Mergers, joint ventures, and other forms of business combination have long been recognized as an important means of achieving pro-consumer business objectives favored by the antitrust laws. They allow companies to achieve procompetitive efficiencies by eliminating redundancies, obtaining economies of scale, and facilitating access to complementary resources. *E.g., Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) ("[M]ergers, joint ventures, and various vertical agreements, hold the promise of increasing a firm's efficiency and enabling it to compete more effectively.").[3]

---

[3] *Accord Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 295 (1985) (joint purchasing venture

Recognizing these procompetitive benefits, this Court has evaluated joint ventures under antitrust rules that do not needlessly deter or penalize them. In an important trilogy of cases, for example, the Court established that restraints ancillary to legitimate joint ventures are to be judged under the rule of reason. *See Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 295 (1985); *NCAA v. Bd. of Regents*, 468 U.S. 85, 100-01 (1984); *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 19-20 (1979). As observed by leading antitrust commentators, "the legal and economic literature on joint ventures is largely favorable toward them, and antitrust generally begins its analysis with a presumption of legality." XIII Herbert Hovenkamp, *Antitrust Law* ¶ 2121b, at 117-18 (2d ed. 2005).

The Ninth Circuit's decision radically departs from this law, and creates a circuit split on an issue that demands clear, nationally uniform rules. Its ruling that Section 1 applies here conflicts with the conclusions of other courts and the leading antitrust commentators that a joint venture entity is a single firm when it runs its own business by, for example, selecting suppliers, purchasing inputs, choosing what markets to sell in, or selling its own output. As a single firm, its actions, like those of any other single company that buys or sells products in the marketplace, are unilateral actions not

---

"permits the participating retailers to achieve economies of scale in both the purchase and warehousing of wholesale supplies, and also ensures ready access to a stock of goods that might otherwise be unavailable on short notice"); *NCAA v. Bd. of Regents*, 468 U.S. 85, 103 (1984) ("a joint selling arrangement may be so efficient that it will increase sellers' aggregate output and thus be procompetitive"); Thomas A. Piraino, Jr., *Reconciling Competition and Cooperation: A New Antitrust Standard for Joint Ventures*, 35 Wm. & Mary L. Rev. 871, 876 (1994) ("A joint venture may allow its partners to achieve economic efficiencies that they could not have accomplished on their own. In the long run, such efficiencies may outweigh any restriction of competition caused by a joint venture.").

subject to Section 1. Similarly, even in circumstances in which Section 1 may properly be applied to restraints related to a legitimate joint venture, other circuits have held that those restraints must be evaluated under the rule of reason, not condemned as *per se* illegal without any evaluation of their actual effects in the marketplace. The First and Eleventh Circuits have specifically so held with respect to pricing decisions associated with a joint venture. The Ninth Circuit's ruling directly conflicts with those rulings. The Ninth Circuit's decision also conflicts with decisions of other circuits that have applied the rule of reason to evaluate similar kinds of restraints associated with joint ventures.

This Court's resolution of this conflict is urgently needed. The Court recently granted certiorari in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872 (2004), to address the much-litigated question of a firm's liability under Section 2 for refusing to deal with rivals. In overturning the Second Circuit's ruling, the Court warned that mistaken application of the antitrust laws "and the resulting false condemnations are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Id.* at 882 (internal quotation marks omitted). That is precisely the consequence that will flow from the Ninth Circuit's mistaken ruling here, which is no less pernicious than the Second Circuit's ruling in *Verizon* and which, because of the Ninth Circuit's size and the national scope of many joint ventures, has implications for businesses throughout the national economy.

This case is an ideal vehicle for resolving these issues, as it vividly illustrates the unfairness that results from misapplication of the antitrust laws. Equilon is a classic example of a bona fide, efficiency-enhancing integrated business. Its creation was extensively reviewed, and consented to, by federal and state antitrust regulators. No challenge is made to its existence or right to produce and sell its own products. Yet, the Ninth Circuit has ruled that the act of pricing its own products is subject not only to antitrust

scrutiny but to *per se* condemnation. No conceivable antitrust policy is served by this judicial intrusion into the internal decisionmaking of a legitimate business. The conduct here was the competitive equivalent of General Motors (itself the product of various business combinations in the past) deciding to set the same price for its Chevrolet Malibu and Pontiac Grand Am. Condemning such conduct will unfairly penalize legitimate behavior, burden the courts with pointless litigation, and deter the formation of procompetitive businesses.

This Court should grant certiorari to overturn the Ninth Circuit's ruling and make clear that a legitimately formed joint venture entity has the same right under the antitrust laws as does any other single entity to make unilateral decisions about its business operations without fear of attack under Section 1 of the Sherman Act and possible *per se* condemnation.

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CIRCUIT CONFLICT AS TO THE PROPER TREATMENT UNDER SECTION 1 OF THE SHERMAN ACT OF A JOINT VENTURE ENTITY'S OPERATION OF ITS OWN BUSINESS.

A. The Ninth Circuit's Ruling That Section 1 Applies Is At Odds With The Decisions Of This Court And Other Circuits.

The threshold question in any case under the Sherman Act is whether the conduct in question is that of a single firm or multiple firms. That is because "[t]he Sherman Act contains a basic distinction between concerted and independent action." *Copperweld*, 467 U.S. at 767 (internal quotation marks omitted). Section 1 "reaches unreasonable restraints of trade effected by a 'contract, combination ... or conspiracy' between *separate* entities." *Id.* at 768 (quoting 15 U.S.C. § 1). It does not reach "[t]he conduct of a single firm," which "is governed by § 2 alone and is unlawful only when it threatens actual monopolization." *Id.* at 767

(footnote omitted). This more exacting standard for concerted action reflects Congress' judgment that concerted action carries greater competitive risk because it "represent[s] a sudden joining of two independent sources of economic power previously pursuing separate interests"—a "merging[] of resources" that "increases the economic power moving in one particular direction." *Id.* at 769, 771. By contrast, decisions within a single firm do not represent such a "merging[] of resources" and are not subject to Section 1 scrutiny, thus leaving companies free to vigorously compete without having their "every action [subjected] to judicial scrutiny for reasonableness." *Id.* at 775.

The Ninth Circuit's ruling that Equilon's operation of its own business is concerted action rather than single firm conduct is at odds with decisions of this Court and of other circuits. In a passage that describes this case nearly exactly, this Court observed in *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982), that a joint venture "in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit. . . . is regarded as a single firm competing with other sellers in the market." *Id.* at 356. The Court thus recognized that, in such a cooperative venture, "a price-fixing agreement among the [partners] would be perfectly proper." *Id.* at 357. As discussed below, this principle should have led the Ninth Circuit to rule that Section 1 does not apply to the pricing decisions here.

Similarly, in *Chicago Professional Sports Limited Partnership v. NBA*, 95 F.3d 593 (7th Cir. 1996), the Seventh Circuit observed that the NBA may be "best understood as one firm when selling broadcast rights to a network in competition with a thousand other producers of entertainment, but is best understood as a joint venture when curtailing competition for players who have few other market opportunities." *Id.* at 600; *see also Mt. Pleasant v. Associated Elec. Coop.*, 838 F.2d 268, 276 (8th Cir. 1988) (holding that Section 1 does not apply to the pricing

decisions of an electric cooperative as a purported conspiracy among its members); *Nurse Midwifery Assocs. v. Hibbett*, 918 F.2d 605, 616 (6th Cir. 1990) (recognizing that Section 1 should not apply to decisions of "former competitors operating a joint venture which competes in the market with other sellers").[4]

The Ninth Circuit's decision conflicts with these authorities. In setting a price for its own gasoline, Equilon was acting "as a single firm competing with other sellers in the market." *Maricopa County*, 457 U.S. at 356. Like the "typical joint venture," it was engaged in "research, production [and] distribution *in its own right*." VII Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1478a, at 319 (2003) (emphasis added). As Judge Fernandez correctly recognized, as a "separate entity," it was entitled to select the price for its own product "as any other entity could." Pet. App. 31a, 32a.

The Ninth Circuit's ruling is also inconsistent with and undermines the approach of the Federal Trade Commission and the Department of Justice in their *Antitrust Guidelines for Collaborations Among Competitors*.[5] Those guidelines recognize that competitor collaborations should be analyzed under the same standards as a merger (which do not subject the merged entity's operation to Section 1 scrutiny) where the collaboration involves an efficiency-enhancing integration of economic activity in the relevant market, ends all competition between the participants in that market, and lasts for a sufficiently long period. *Id.* § 1.3. The formation of

---

[4] *See also Addamax Corp. v. Open Software Foundation*, 152 F.3d 48, 52 (1st Cir. 1998) (questioning how far the theory that "the operations of the joint venture represent collaboration of the separate entities that own or control it . . . can be pressed in the case of a truly integrated enterprise whose 'owners' were no more than stockholders").

[5] 4 Trade Reg. Rep. (CCH) ¶ 13,161 (2000) (available at <www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>) [hereinafter *Guidelines*].

Equilon falls squarely within this description. Indeed, the *Guidelines* use an example that is based on Equilon to illustrate a venture that should be treated as a merger. *Id.* Example 1.

B. The Circuits Are Split Over The Circumstances In Which, Assuming Section 1 Applies, The Pricing Decisions Of A Joint Venture May Be Subjected To *Per Se* Treatment.

Even if Section 1 could apply, the Ninth Circuit's holding that a legitimate joint venture's pricing of its own products could be *per se* illegal independently justifies certiorari. The Ninth Circuit ruled that *per se* treatment is required unless the defendants can show that the *particular* pricing strategy adopted by the venture entity—as opposed to the setting of any price at all—is "reasonably necessary to further the legitimate aims of the joint venture." Pet. App. 21a. This ruling directly conflicts with decisions of the First and Eleventh Circuits. In cases in which they applied Section 1 (where the venture did not involve complete economic integration and the owners remained competitors in the relevant market), those circuits nonetheless rejected application of the *per se* rule to pricing decisions associated with a joint venture without requiring any showing of necessity of the kind demanded by the Ninth Circuit.

In *Augusta News Co. v. Hudson News Co.*, 269 F.3d 41 (1st Cir. 2001), the plaintiff sued a joint venture formed by newspaper and magazine distributors to service large chain retailers. The plaintiff alleged that the venture's setting of up-front fees to be paid to retailers in exchange for exclusive distribution contracts was *per se* illegal price-fixing. The First Circuit rejected this contention, holding that the agreement on fees must be evaluated under the rule of reason even though it was the type that would be *per se* illegal if not part of a joint venture. The court reasoned that "it is a standard form of joint venture for local firms to combine to provide offerings . . . that none could as easily provide by

itself, and a joint venture often entails setting a single price for the joint offering." *Id.* at 48. The court ruled that *per se* treatment is limited to the circumstance where the agreement on price is "not part of a larger, legitimate economic venture." *Id.* at 47. In conflict with the Ninth Circuit, the court did not require any proof that the particular fee set by the venture was necessary to the venture's success.

The First Circuit reached the same result in *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47 (1st Cir. 2002), where it "disagree[d] completely" with the contention that restrictions on player salaries imposed by Major League Soccer should be treated as a *per se* illegal price-fixing conspiracy among the team operators. *Id.* at 56. The court found "rejection of the *per se* rule [to be] straightforward" because "the extent of real economic integration is obvious," the collaboration served procompetitive purposes, and the actual effects of salary restrictions were "simply too uncertain to warrant application of the *per se* rule." *Id.* at 59. The court evaluated the propriety of the particular details of the salary restrictions under the full rule of reason analysis, not as a prerequisite to applying the rule of reason at all.

Similarly, in *National Bancard Corp. v. Visa U.S.A.*, 779 F.2d 592 (11th Cir. 1986), the Eleventh Circuit held that an agreement among members of the Visa joint venture to charge an interchange fee was governed by the rule of reason. The court ruled that, "[f]or a payment system like VISA to function, rules must govern the interchange of cardholder's receivables" and the interchange fee "represents one such rule." *Id.* at 602. Again, in conflict with the Ninth Circuit's ruling, the court did not require proof that the particular level at which the fee was set was necessary to the enterprise.

The Ninth Circuit's ruling is also contrary to the repeated decisions of other courts of appeals applying the rule of reason to a wide range of other conduct by joint venture entities (including conduct that would be illegal *per se* if

unassociated with a joint venture) without imposing any threshold "necessity" requirement of the type the Ninth Circuit imposed. *See Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210, 224 (D.C. Cir. 1986) (applying rule of reason to rule prohibiting members from competing with the joint venture); *United States v. Visa U.S.A.*, 344 F.3d 229, 238 (2d Cir. 2003) (applying rule of reason to judge validity of rules prohibiting Visa member banks from issuing cards of other credit card companies), *cert. denied*, 125 S. Ct. 45 (2004); *Chicago Prof'l Sports*, 95 F.3d at 600 (holding that rule of reason applies to output restriction imposed by the NBA); *Polk Bros., Inc. v. Forest City Enters.*, 776 F.2d 185, 190-91 (7th Cir. 1985) (applying rule of reason to an agreement between members of a joint venture not to compete with respect to certain products from their adjoining stores).

Had this action been brought in any of these circuits, the analysis and the outcome would have been different. The court would have recognized that a bona fide venture must select some price for its products. And it would have found this necessity sufficient by itself to preclude *per se* treatment and would have required that the price-setting decision be evaluated under the rule of reason, if it were subject to Section 1 scrutiny at all.

II. THE PROPER ANTITRUST TREATMENT OF A JOINT VENTURE'S OPERATIONAL DECISIONS IS AN IMPORTANT QUESTION ON WHICH THIS COURT'S GUIDANCE IS URGENTLY NEEDED.

The proper resolution of these issues is a matter of great importance to businesses and the national economy. Businesses contemplating a joint venture (or participating in one already formed) must know the rules that govern their behavior. As this case illustrates, whether Section 1 applies and whether it imposes *per se* liability can have dramatic and potentially devastating consequences for joint venture

participants. Faced with conflicting decisions on these issues, and with the threat of after-the-fact antitrust condemnation and potential treble damage liability created by the Ninth Circuit's decision, companies will inevitably curtail or forego legitimate business ventures.

This threat to joint venture activity has broad practical ramifications. Joint ventures are present in nearly every sector of business and are an increasingly important source of economic growth. *See* Jon G. Shepherd, Editor's Note, *Symposium: Antitrust Scrutiny of Joint Ventures*, 66 Antitrust L.J. 641, 641 (1998); Thomas A. Piraino, Jr., *A Proposed Antitrust Approach to Collaborations Among Competitors*, 86 Iowa L. Rev. 1137, 1139 (2001). As the *Collaboration Guidelines* recognize, competitor collaborations "often are not only benign but procompetitive." *Guidelines*, Preamble. They can produce real consumer benefits because "[c]ooperation is the basis of productivity. It is necessary for people to cooperate in some respects before they may compete in others, and cooperation facilitates efficient production." *Polk Bros.*, 776 F.2d at 188. It is therefore critical that judicial and regulatory enforcement not foster "a perception that antitrust laws are skeptical about" such collaboration and thereby deter their development. *Guidelines*, Preamble.

The issues here go to the core of these concerns, and their resolution will have wide application. Whether Section 1 applies at all is a critical threshold question of importance to a broad range of joint ventures. A ruling that Section 1 does not apply to the kind of conduct at issue here would eliminate much needless litigation and avoid the very kind of misapplication of the antitrust laws—and consequent deterrent to legitimate joint ventures—that this case exemplifies. As one commentator observed, in language that presaged the present case, "[t]reating joint ventures as single entities for limited purposes allows meritless group-boycott and price-fixing claims, which could be erroneously decided under the *per se* rule, to be rejected as a matter of law."

Gregory J. Werden, *Antitrust Analysis of Joint Ventures: An Overview*, 66 Antitrust L.J. 701, 705 n.18 (1998). Similarly, a ruling from this Court on whether and the degree to which proof of "necessity" is a prerequisite to applying the rule of reason in the joint venture context not only would decide the issue for this case and other cases challenging a joint venture's pricing decisions, but would provide guidance for any case involving a restraint alleged to be related to a joint venture.

This case is a compelling vehicle for providing this guidance. The factual setting here—an entity formed by former competitors to combine their production and marketing businesses—is a commonly recurring one. *See* VII *Antitrust Law* ¶ 1478a, at 319 ("typical joint venture" engages in "research, production, or distribution in its own right"). The issues have been illuminated by a detailed decision of the district court and divergent opinions in the Ninth Circuit. The issues have likewise been addressed in numerous other decisions, producing a sharp conflict of views with the decision below.

The Court also has the benefit of considerable scholarly and academic commentary—commentary which has remarked on the confusion in the law relating to joint ventures and the need for this Court's guidance. *See supra* p. 16 and *infra* pp. 19-20, 24-25; *see also* E. Gelhorn & W. Todd Miller, *Competitor Collaboration Guidelines—A Recommendation*, 42 Antitrust Bull. 851, 853 (1997) ("the legal rules and policies applied to competitor collaborations often are confused and confusing"); Howard H. Chang, *et al.*, *Some Economic Principles for Guiding Antitrust Policy Towards Joint Ventures*, 1998 Colum. Bus. L. Rev. 223, 225 ("The antitrust treatment of joint ventures is often tortured."); Piraino, 86 Iowa L. Rev. at 1189 ("Courts, commentators, and the enforcement agencies have disagreed over the standard for determining when a particular restraint should be upheld as ancillary to a joint venture.").

Indeed, the Ninth Circuit's decision itself has sparked recent (and critical) comment. Noting that the "[a]pplication of the antitrust laws to joint ventures has always been unusually enigmatic," the authors described the decision below as "resoundingly amplif[ying] these perplexities." Neal R. Stoll & Shepard Goldfein, *Catch 22 for Joint Ventures*, N.Y.L.J., Aug. 17, 2004, at 3. They concluded that the Ninth Circuit took "an analytically wrong turn" in applying *per se* treatment and should have affirmed the district court's ruling that Equilon's pricing was not unlawful. *Id.*

The issues presented here are fully ripe for review. Only a clear resolution by this Court can bring the needed certainty and predictability to this area of competition law. The Court should grant certiorari to reject the Ninth Circuit's ruling and remove the long shadow the ruling casts on legitimate joint venture activities.

III. THE NINTH CIRCUIT'S RULING WAS FUNDAMENTALLY MISTAKEN.

A. A Joint Venture Entity's Operation Of Its Own Business Is Single Firm Conduct, Not Concerted Action.

There is no question that the decision of two companies to form a joint venture itself is a "merging of resources" to which Section 1 applies (along with Section 7 of the Clayton Act), just as Section 1 (and Section 7) would apply to a complete merger of two previously independent companies. *See United States v. Penn-Olin Chemical Co.*, 378 U.S. 158 (1964) (analyzing under Section 1, and under Section 7 of the Clayton Act, the formation of a joint venture to build a chemical plant).

Similarly, if members of a joint venture entity agree to restrictions on their own activities outside of the venture or to other similar collateral restraints, the courts have recognized that Section 1 would apply to any such agreement. *See, e.g., United States v. Visa U.S.A.*, 344 F.3d

at 238 (applying Section 1 to judge validity of rules prohibiting Visa member banks from issuing cards of other credit card companies).

Neither circumstance is at issue here. The Ninth Circuit did not suggest that Equilon's formation violated Section 1. That formation decision was the subject of extensive antitrust review by the FTC and the state attorneys general, who found Equilon's formation to be lawful, conditioned on certain divestitures. Nor do plaintiffs challenge any collateral restraints entered into in connection with the venture. The pricing strategy at issue here applied only to Equilon's output.

Instead, plaintiffs attack Equilon's operation of its own separate business—*i.e.*, establishing a price for the products it sells. The Ninth Circuit's ruling that this is concerted action is unfounded. The "sudden joining of two independent sources of economic power previously pursuing separate interests" to which Section 1 applies (*Copperweld*, 467 U.S. at 771), is the entity's formation, not its operation once formed. The inapplicability of Section 1 is particularly clear in a case like this, where the joint venture is a complete merger of the former businesses of the companies involved and where the owners have a "complete unity of interest" (*id.*) in the entity's operation because the business' profits are divided based on total sales rather than the sale of any particular brand.

The leading antitrust treatise makes the point clearly: where joint enterprises "are buying and selling in their own right, they can fairly be regarded as single entities whose selling decisions are not 'price-fixing conspiracies' and whose buying decisions are not 'boycott conspiracies.'" VII *Antitrust Law* ¶ 1477, at 316. Thus, "[o]nce a venture is judged to have been lawful at its inception and currently, decisions that do not affect the behavior of the participants in their nonventure business should generally be regarded as

those of a single entity rather than the parents' daily conspiracy." *Id.* ¶ 1478, at 325.

Other commentators agree:

> When a joint venture itself participates in the marketplace, its ordinary actions as a market participant are those of a single entity. Hence, a joint venture acts as a single entity when it purchases inputs from third parties or sets a price or output for sale to third parties of a product not sold to participants.

Werden, 66 Antitrust L.J. at 704-05 (footnotes omitted).

Applying Section 1 of the Sherman Act or Section 7 of the Clayton Act to the agreement to form the venture ensures that the entity itself serves legitimate procompetitive purposes that outweigh any harm to competition. Once that determination is made, no further purpose is served by applying Section 1 to each of the entity's ongoing business decisions, and it would be seriously disruptive to do so. *See* VII *Antitrust Law* ¶ 1478c, at 326 (once a joint venture is itself permitted, its "function will be performed most efficiently by an organization that can operate with the same legal freedoms as the ordinary business entity").

Indeed, permitting an attack on a joint venture's operation of its own stand-alone business would unfairly allow after-the-fact attacks on the entity itself. Equilon was an all-purpose company that produced and sold its own products. Its formation necessarily contemplated that it would set the price for those products, and the FTC and the States determined that it would not violate the antitrust laws for Equilon to have that power. That determination having been made, it is fundamentally unfair to now subject Equilon and its owners to antitrust litigation and potential *per se* condemnation for conducting the very business for which Equilon was created.

The Ninth Circuit tried to justify its contrary result on the ground that Shell and Texaco had allegedly agreed upon the

pricing strategy "in advance" when negotiating Equilon's formation. Pet. App. 19a n.11. But this reasoning only demonstrates the illogic of the Ninth Circuit's decision and highlights the need for this Court's review. When the operation of an economically integrated entity's business is at issue, Section 1's application should not turn on a judge or jury dissecting whether a given decision was that of the entity itself or its owners, or whether it was made when the entity was initially negotiated or thereafter. No competitive consequence attaches to such distinctions. Because the decision does not involve any non-venture activity but only the entity's own operation as to which its owners have no separate economic interests, the effect on the marketplace is identical regardless of when or how the decision was reached. Moreover, the feasibility of entering the joint venture at all, and of achieving any cost savings or potential efficiencies, often will depend on the parties' discussing or agreeing on these issues before the transaction is completed and the new entity formed. Making antitrust scrutiny turn on such timing would generate expensive and pointless litigation, while deterring firms from entering joint ventures or making their entry less well-informed.

The fallacy of the Ninth Circuit majority's approach is further demonstrated by the court's assertion that its "analysis would be different" if Equilon were producing a "new product" or if Shell and Texaco had "merge[d] their current product lines into one collective brand." Pet. App. 27a. The majority did not explain why Section 1 scrutiny should turn on such distinctions. If any competitive significance attends the fact that a joint venture entity is producing something one or more of its members had previously produced rather than a new product, such significance will be accounted for in evaluating the venture's formation and structure. Once the venture itself is found valid, whether it is producing a new product or an old one is irrelevant to any policy underlying Section 1. Nor is it relevant that the combined entity sells its product under two brand names rather

than one. A producer of consumer products is not subject to Section 1 merely because it sells those products under several different brands (a practice that is quite common in many markets), regardless of whether it sets the same price for each or how it reaches its pricing decisions. No different rule should apply to a fully integrated joint venture that chooses to sell its products under multiple brand names rather than one.[6]

B. The Ninth Circuit's Ruling That *Per Se* Treatment May Be Applied Conflicts With This Court's Decisions And Basic Antitrust Principles.

Even if a validly formed joint venture entity's operation of its own separate business could be viewed as concerted action, no conceivable basis exists for condemning it as *per se* illegal. *Per se* rules are reserved for cases in which it can be said confidently that the conduct at issue is "plainly anticompetitive" and likely to have no "redeeming virtue." *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 8 (1979). *Per se* rules are not proper where the restraint is "imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious." *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 458-59 (1986). Thus, as noted above (pp. 13-15), other lower courts

---

[6] The Ninth Circuit also suggested that Section 1 scrutiny is necessary to prevent companies from using joint ventures as "fronts for price-fixing." Pet. App. 26a. But single firm treatment is reserved for decisions of a validly formed entity acting in its own right to conduct its own separate business. If no such business has been formed, or if the restraint at issue is something other than the entity conducting its own business, Section 1 may apply. For this reason, the Ninth Circuit's hypothetical of Pepsi and Coca-Cola forming a research joint venture and then using that as a front for fixing the price of soft drinks (Pet. App. 16a) is a straw man. Any such price-fixing would not be part of the research joint venture's business but would be a restraint on the members' activities outside the venture.

have repeatedly rejected *per se* treatment for decisions of the kind here associated with legitimate joint ventures.

The Ninth Circuit, however, held that the *per se* rule applies unless the defendants can show that Equilon's particular pricing strategy was "necessary." The court sought to ground this "necessity" requirement in this Court's decisions in *BMI*, 441 U.S. 1, and *NCAA v. Board of Regents*, 468 U.S. 85 (1984). *See* Pet. App. 21a-22a. But those decisions only confirm the Ninth Circuit's fundamental error.

In holding that the rule of reason governed the joint venture's pricing of the blanket license in *BMI*, this Court did not ask whether the defendants' particular pricing strategy was necessary to achieve the venture's procompetitive purposes. Rather, it was enough that the defendants could not market the license without setting some price for it. In other words, setting a price—some price—was necessary to the venture's success. That is what this Court was referring to when it stated, in the passage quoted by the Ninth Circuit, that joint ventures are not unlawful as price-fixing schemes "where the agreement on price is necessary to market the product at all." 441 U.S. at 23. The ultimate legality of the particular pricing scheme "in all of its many manifestations" was to be examined under the "more discriminating examination" of the rule of reason itself, not through a truncated analysis that considers only its purported necessity. *Id.* at 24. As the Court explained, "[w]hen two partners set the price of their goods or services, they are literally 'price-fixing,' but they are not *per se* in violation of the Sherman Act." *Id.* at 9.

Similarly, the Court's application of the rule of reason in *NCAA* did not turn on the "necessity" of the particular details of the NCAA's rule restricting the number of football games individual schools could televise. In rejecting *per se* treatment for that output limitation (which normally would be subject to *per se* treatment if agreed to by multiple firms), the Court did not require proof that the particular number of

games set by the NCAA was necessary to the NCAA's purposes. Indeed, the Court did not require proof that any output restriction at all was necessary—and the Court's ultimate conclusion was that no output restriction was justified. Instead, *per se* treatment was improper simply because some "degree of cooperation is necessary" for the NCAA's product to exist. 468 U.S. at 117; *see id.* at 101 (citing need for rules governing player eligibility and the conduct of the games themselves).[7]

The Ninth Circuit also relied (Pet. App. 21a) on Professor Hovenkamp but his treatise rejects the Ninth Circuit's new rule. He points out that, where a joint venture makes one or more products, those products "are jointly owned and cannot be sold without an agreement between the owners as to the price that will be charged for them." XI Herbert Hovenkamp, *Antitrust Law* ¶ 1908e, at 264 (2d ed. 2005). Nowhere does he suggest that any particular pricing scheme must be necessary. Instead, so long as the joint venturers do "not enter into any agreement to fix the price of their nonventure output," no charge of *per se* unlawful price fixing is legitimate. *Id.*; *see also id.* ¶ 1906d, at 239 ("[M]any forms of joint marketing require an agreement about the price to be charged."); *id.* ¶ 1908e, at 263-64 ("[A]greements about price are often essential to the administration of certain joint ventures, particularly in distribution."). Thus, Professor Hovenkamp concludes:

[7] No issue appears to have been raised in *BMI* or *NCAA* whether the conduct there was concerted action or single firm behavior. As in the court of appeals cases discussed above (pp. 13-15), however, applying Section 1 was consistent with the fact that in both cases the venture participants continued to produce the underlying product and remained competitors in the relevant market. That is not true here, where Equilon was the sole producer and owner of the gasoline it sold, and Shell and Texaco had exited and no longer competed in the relevant market.

> Th[e] joint setting of a price may often be necessary in cases of joint ownership of the good or service being sold. When the joint owners are also competitors, the result is literally 'price fixing,' but it is a form of price fixing that should, when bona fide, be examined under the rule of reason.

XIII Herbert Hovenkamp, *Antitrust Law* ¶ 2132c, at 180 (2d ed. 2005).[8]

Indeed, applying the *per se* rule in this circumstance makes no sense. The Ninth Circuit effectively held that it could conclude with confidence (and without any market analysis) that Equilon's pricing was necessarily anticompetitive. But even if setting the same price for both brands were not necessary to Equilon's success, that would hardly establish that the pricing strategy was anticompetitive, let alone so inevitably anticompetitive that it may be condemned as *per se* illegal without requiring an evaluation of its actual effect in the marketplace.

The Ninth Circuit asserted that "[n]ormally" businesses will consider a variety of factors in pricing their products and that it "seems likely" that an "independent" analysis would

[8] *Per se* treatment may be appropriate where the venture does not involve economic integration and the restraint governs the venture owners' conduct as continuing independent competitors in the relevant market. *See Maricopa County*, 457 U.S. at 356-57 (applying *per se* rule to fee schedule adopted by medical association in which the doctors had not "pool[ed] their capital and share[d] the risks of loss as well as the opportunities for profit"); *Citizen Publ'g Co. v. United States*, 394 U.S. 131, 135 (1969) (applying *per se* rule to a newspaper joint venture that set advertising and subscription rates for the individual newspapers but which did not integrate the underlying news and editorial departments of those newspapers, which remained independent competitors); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 597-98 (1951) (applying *per se* rule because the "joint venture" involved was a mere sham designed to mask a naked horizontal agreement to allocate territories). That is not the situation here.

result in a "rational decision to sell the different brands at different prices." Pet. App. 23a. How a court could believe itself competent to engage in such analysis is hard to fathom. But even if this analysis were correct, it does not justify *per se* condemnation. Saying that a business might "rationally" decide to adopt one pricing scheme does not establish that any other pricing scheme is invariably anticompetitive and likely to have no redeeming value.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT A. MITTELSTAEDT
CRAIG E. STEWART
(Counsel of Record)
MARTHA BOERSCH
JONES DAY
555 California St., 26th Floor
San Francisco, CA 94104
(415) 626-3939

JOE SIMS
LOUIS K. FISHER
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

Counsel for Petitioner

December 14, 2004

APPENDIX

Contents

Order of the U.S. Court of Appeals for the Ninth Circuit on Petitions for Rehearing and Rehearing En Banc (Sept. 15, 2004) 1a

Opinions of the U.S. Court of Appeals for the Ninth Circuit (June 1, 2004) 2a

Memorandum and Order of the District Court on Motions for Summary Judgment (Part I) (C.D. Cal. May 21, 2002) 34a

Memorandum and Order of the District Court on Motions for Summary Judgment (Part II) (C.D. Cal. Aug. 13, 2002) 46a

[Filed Sept. 15, 2004]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FOUAD N. DAGHER; et al., Plaintiffs-Appellants, v. SAUDI REFINING INC., (SRI); et al., Defendants-Appellees, and, MOTIVA ENTERPRISES LLC; et al., Defendants.	No. 02-56509 D.C. No. CV-99-06114-GHK Central District of California, Los Angeles ORDER

Before: REINHARDT, FERNANDEZ, and RAWLINSON, Circuit Judges.

The panel has voted unanimously to deny the petitions for rehearing, and a majority of the panel voted to deny the petition for rehearing en banc. The full court has been advised of the petitions for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petitions for rehearing and rehearing en banc are denied.

[Reported at 369 F.3d 1108]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FOUAD N. DAGHER; et al.,

Plaintiffs-Appellants,

v.

SAUDI REFINING INC., (SRI); et al.,

Defendants-Appellees,

and

MOTIVA ENTERPRISES LLC; et al.,

Defendants.

No. 02-56509
D.C. No.
CV-99-06114-GHK
OPINION

Appeal from the United States District Court
for the Central District of California
George H. King, District Judge, Presiding

Argued and Submitted: October 7, 2003

Filed: June 1, 2004

Before: Stephen Reinhardt, Ferdinand F. Fernandez, and Johnnie B. Rawlinson, Circuit Judges.

OPINION

REINHARDT, Circuit Judge:

Plaintiffs Fouad N. Dagher, et al., appeal from the district court's award of summary judgment to the defendants, Texaco, Inc., Shell Oil Co., and Saudi Refining, Inc. (SRI), et al. The plaintiffs represent a class of 23,000 Texaco and Shell service station owners who allege that the defendants

conspired to fix the nationwide prices for the Shell and Texaco brands of gasoline through the creation of a national alliance consisting of two joint ventures. The district court granted two summary judgment motions: one to dismiss defendant SRI because the plaintiffs lacked antitrust standing; the other to dismiss the complaint against the remaining defendants because the plaintiffs failed to raise a triable issue of fact as to whether the Sherman Antitrust Act's *per se* prohibition against price fixing is applicable to the economic arrangements between the defendants. We affirm the district court's ruling as to the plaintiffs' standing to sue SRI, but reverse the district court's decision that the plaintiffs failed to create a triable issue of fact under the Sherman Act.

I. Factual and Procedural History

A. Factual History

Texaco, Inc., and Shell Oil Co. were once fierce competitors in the national oil and gasoline markets. They competed at both wholesale and retail levels, and in both upstream and downstream operations.[1] The two companies generally operated by independently refining gasoline and then selling the gas either to licensed Texaco and Shell service stations or to wholesale distributors.

From 1989 to 1998, defendants Saudi Refining, Inc. (SRI) and Texaco sold gas on the East Coast through Star Enterprise, a joint venture "engaged in the refining and marketing of gasoline under the Texaco brand." Both Shell and Texaco sensed intensified competition in the downstream operations of their industry—they similarly believed that "the oil industry was about to enter a period of consolidation." To respond to the heightened competition in

[1] The parties have explained in their joint stipulations that "[c]rude oil is the raw product from which gasoline is made at a refinery. Upstream operations consist of exploring for and producing crude oil, and downstream operations consist of refining crude into gasoline and other products and marketing the finished products."

the oil and gas industry, Shell approached Texaco in 1996 about several potential corporate combinations designed to enhance efficiency and reduce competition between the two companies with respect to the downstream refining and marketing of gasoline. In 1998, preliminary discussions yielded an agreement to form a nationwide alliance (hereinafter: "the alliance")[2] consisting of two separate joint ventures.[3] One joint venture was named "Equilon Enterprises" (Equilon); it combined Shell's and Texaco's downstream operations in the western United States. The other venture, formed by Texaco, Shell, and SRI, was named "Motiva Enterprises" (Motiva); it combined the three companies' downstream operations in the eastern United States. The alliance had a national market share of 15% of all gasoline sales, and on the West Coast, Equilon's market share exceeded 25%.

There is a voluminous record documenting the economic justifications for creating the joint ventures. After analysis by teams made up of representatives of all three companies, the defendants concluded that numerous synergies and cost

---

[2] Defendants dispute that an "alliance" existed and characterize Equilon and Motiva as distinct entities. Appellees' Brief, at 46. While the defendant corporations did not create a new legal entity called "The Alliance," the record establishes beyond dispute that representatives of Texaco and Shell generally referred to the two joint ventures as part of a single project to combine the two companies' nationwide refining and marketing operations. Moreover, the record confirms that the single project was often referred to as "an alliance," and frequently called "The Alliance," by representatives of Texaco, Shell, and SRI, and by Board Members from the two joint ventures, "Equilon Enterprises" (Equilon) and "Motiva Enterprises" (Motiva). When we refer to "the alliance," we therefore refer to the combined national refining and marketing operation consisting of Equilon and Motiva—an enterprise which was created, developed, and maintained collectively by the individual defendant corporations.

[3] The district court explained the massive scope of the alliance: "[t]he downstream assets in Equilon and Motiva include twelve refineries, twenty-three lubricant plants, two research laboratories, 22,000 branded service stations, over 24,000 miles of pipeline, 107 terminals, and approximately 24,000 employees."

efficiencies would result. The defendants concluded that nationwide there would be up to $800 million in cost savings annually. The Federal Trade Commission and several State Attorneys General approved the formation of the joint ventures, subject to modifications demanded by both the federal agency and the various Attorneys General.

The creation of the alliance ended competition between Shell and Texaco throughout the nation in the areas of downstream refining and marketing of gasoline. Texaco and Shell signed non-competition agreements which prohibited them from competing with either Equilon or Motiva and committed them "not to engage in the manufacturing and marketing of certain products in the [relevant] geographic area[s], including fuel, synthetic gasoline, and electricity." The two joint ventures established fixed ratios for profit sharing and for bearing the risk of losses. In Equilon, Shell has a 56% interest while Texaco owns 44%. In Motiva, Shell owns 35%, while SRI and Texaco each own 32.5%.

Despite the collective assumption of risk and resource pooling in the joint ventures, Shell and Texaco continued to operate as distinct corporations. Each retained its own trademarks and kept control over its own brands pursuant to separate Brand Management Protocols, each of which prohibited the joint ventures from giving preferential treatment to either brand. Under the joint venture agreements, Equilon and Motiva market Shell and Texaco gasoline under licensing agreements governing both the sale of the products and the use of the Shell and Texaco trademarks. Each company maintained its ability to return to individual sales and marketing—the joint ventures contain provisions allowing for dissolution at any time by mutual consent or, after five years time, by unilateral dissolution with two years advance notice.

The various agreements between the oil companies allowed Texaco and Shell to consolidate and unify the pricing of the Texaco and Shell gasoline brands within the

Equilon and Motiva joint ventures. Before creating the two joint ventures, Shell, Texaco, and Star all independently set prices for their wholesale and retail sales, generally through decisions made by their corporate pricing units. Testimony in the record reveals that, either immediately before the formation of the joint ventures or sometime shortly thereafter, "a decision was made that the Shell and Texaco brands would have the same price in the same market areas." The decision to charge the same price for the two distinct brands "was developed as sort of an operating requirement right from the very start or near to the very start of the alliance." Equilon and Motiva integrated this pricing decision into a project named "The Strategic Marketing Initiative" (SMI), which sought to develop ways in which the alliance could produce and promote both brands more competitively. There is some evidence in the record establishing that the decision to set one price for the two brands was conceived of in the SMI even before Motiva was formed.[4]

The alliance consolidated pricing of the Texaco and Shell brands such that a single individual at each joint venture was responsible for setting a coordinated price for the two brands. The joint ventures did, however, continue to adjust the pegged price of the brands to each unique geographic sale area. The pricing was consolidated despite the fact that Texaco and Shell maintained each brand as a distinct product—each brand has its own unique chemical composition (the gasoline is differentiated by separate packages of "additives"), trademark, and marketing

[4] The record does not establish with certainty whether the decision to price the two brands together was actively discussed during the SMI. The evidence does show that the SMI included a "price optimization" program. And there is some evidence in the record that the price optimization program ratified the unofficial decision to move toward unitary pricing—one witness testified that the price optimization program included "a policy or a procedure to charge the same prices to both—to similar classes of trade in the same marketing areas and to effect those—to effect those changes."

strategy—and competed for customers "at the pump." The companies, and the joint ventures, continued to target each brand at a different customer base—"Texaco customers tend to be more blue-collared and rural than Shell customers, who are more affluent and urban."

The price optimization program may have allowed Equilon and Motiva to raise gasoline prices at a time when the price of crude oil was low and stable. During a time when crude oil prices reached near-historic lows—the price of crude oil decreased from $10 to $12 per barrel between September 1998 and February 1999—Equilon raised its prices $.40 per gallon in Los Angeles and $.30 per gallon in both Seattle and Portland.

B. Procedural History

The plaintiffs commenced this civil action in the United States District Court for the Central District of California. They brought suit on behalf of themselves and approximately 23,000 Shell and Texaco service station owners, alleging that defendants SRI, Texaco, Shell, Motiva, Equilon, Equiva Trading Co., and Equiva Services, LLC, engaged in a price fixing scheme to raise and fix gas prices through the alliance and the two joint ventures, Motiva and Equilon, in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. The plaintiffs disclaimed any reliance on the traditional "rule of reason" test, instead resting their entire claim on either the per se rule or a "quick look" theory of liability.

The defendants moved to dismiss under FED. R. CIV. P. 12(b)(6). The issue with respect to the 12(b)(6) motion was "whether the alleged agreement among Saudi, Shell, and Texaco is an unreasonable restraint of trade . . . under either the *per se* rule or a 'quick look' rule of reason analysis." The district court denied the motion. The court found that although the *per se* rule against price fixing plainly does not make all price-restraining joint ventures illegal, neither does "[a]n agreement to fix prices . . . merit full rule of reason

treatment solely because it is part of a broader joint venture agreement." The court explained that "price fixing can still be illegal per se even if it accompanies an efficient, integrated joint venture. If the joint venture could function perfectly well without price fixing, then the price fixing amounts to no more than an extraneous, anticompetitive restraint that does not merit rule of reason analysis." The district court found that the plaintiffs' complaint alleged sufficient facts to demonstrate that the alliance's price setting regime was a naked, rather than an ancillary, restraint on trade.[5] The district court disposed of the plaintiffs' alternative theories of liability—the plaintiffs originally alleged a "market division" theory and a "manipulation of leases" theory to support their *per se* Section 1 violation—but gave plaintiffs leave to amend.

The parties filed cross-motions for summary judgment. The district court decided the motions in two separate orders. The first order granted SRI's motion for summary judgment on the ground that the plaintiffs lacked antitrust standing because no plaintiff had ever bought gasoline, or other products, from the Motiva joint venture or directly from SRI and because the plaintiffs lacked "direct or circumstantial evidence 'sufficiently unambiguous to permit a trier of fact to find that [SRI] conspired' to fix prices in the western United States absent 'any apparent motive to do so.' " (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 597 (1986)).

The second order granted the remaining defendants' motion for summary judgment on the ground that the rule of reason, not the *per se* or "quick look" rules, governed the Sherman Act analysis of the joint ventures. The district court applied its own analytical framework, consisting of two

[5] A "horizontal agreement [is] 'naked' if it is formed with the objectively intended purpose or likely effect of increasing price or decreasing output in the short run, with output measured by quantity or quality." XI HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1905, at 210 (1998) (hereinafter: HOVENKAMP).

questions: "(1) whether a reasonable trier of fact could conclude that Equilon and Motiva are either mere window-dressings for a price fixing conspiracy or (2) whether they are otherwise patently anticompetitive." The court concluded—relying on the detailed and costly negotiations leading up to the creation of the joint ventures—that Equilon and Motiva were plainly not "fly-by-night" operations designed to cover up an elaborate price-fixing scheme. Moreover, the court found that Motiva and Equilon produced sufficient efficiencies and were sufficiently integrated to constitute indisputably legitimate joint ventures under either the *per se* rule or a "quick look" analysis. Finally, the district court concluded that, because every joint venture "must, at some point, set prices for the products they sell" (citation omitted), a theory which made it illegal for a joint venture to fix prices of its various brands would "act as a per se rule against joint ventures between companies that produce competing products."

II. Standard of Review

We review a district court's grant of summary judgment *de novo*. *United States v. City of Tacoma*, 332 F.3d 574, 578 (9th Cir. 2003). Taking the evidence in the light most favorable to the nonmovant, we must consider whether there are any genuine issues of material fact and whether the district court properly applied the pertinent substantive law. *City of Tacoma*, 332 F.3d at 578; *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407, 410 (9th Cir. 1996). All inferences must be drawn in favor of the nonmovant. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). "In antitrust cases, these general standards are applied even more stringently and summary judgments granted more sparingly." *Beltz Travel Service, Inc. v. International Air Transport Ass'n.*, 620 F.2d 1360, 1364 (9th Cir. 1980) (citations omitted). As the Supreme Court explained in *Poller v. Columbia Broadcasting Sys. Inc.*, 368 U.S. 464 (1962):

> [S]ummary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised.

Id. at 473.

III. Standing

The district court found that the plaintiffs lacked standing to sue SRI. The court's decision was based upon two considerations: first, none of the named plaintiffs had ever purchased any products from SRI or from Motiva; and second, the plaintiffs failed to produce sufficient evidence linking SRI to a conspiracy to fix prices in the Western United States. There is no dispute that the plaintiffs never purchased any products from SRI, or from Motiva. Nor is there any doubt that SRI did not sign any of the documents establishing Equilon, did not refine or market gasoline in the Western United States, and had no motive to conspire with Shell and Texaco to fix those brands' prices in the West. Yet the plaintiffs maintain that SRI engaged in a nationwide price-fixing conspiracy with Texaco and Shell through its participation in Motiva, and therefore is liable for all of the acts of each conspiracy member. *See Beltz Travel*, 620 F.2d at 1367; *see also* Appellants' Brief, at 42.

The plaintiffs rest their theory of standing on the existence of a national conspiracy—and, in this case, defendants Texaco, Shell, Equilon, and Motiva have admitted that they fixed prices by charging the same price for the Texaco and Shell brands. But the plaintiffs do not establish standing under our precedent simply by showing that SRI was involved to some extent in the planning of certain aspects of the alliance. Rather, "[f]or an agreement to constitute a violation of section 1 of the Sherman Act, a 'conscious commitment to a common scheme designed to achieve an

unlawful objective' must be established." *Toscano v. PGA*, 258 F.3d 978, 983 (9th Cir. 2001) (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764, (1984)).

The plaintiffs did proffer evidence showing that Equilon and Motiva were formed as the result of a series of negotiations designed to create a national alliance. Apparently, Shell originally approached the other parties with "ideas about a larger alliance" and explored the possibility of a nationwide alliance. The record contains clear evidence showing that Equilon and Motiva were conceived of as a single strategy to create a national operating structure, separated solely for the sake of efficiency. Moreover, the plaintiffs point to substantial evidence that Equilon and Motiva made pricing decisions together via cooperation through their marketing departments.

Still, the plaintiffs have failed to provide evidence sufficiently implicating SRI in the nationwide price-fixing scheme. The district court found that SRI had "no apparent motive to conspire with Shell and Texaco with respect to Equilon and the Western United States," largely because SRI "would not benefit from any potential anticompetitive effects in Equilon's territory." The plaintiffs have offered no evidence to the contrary. In fact, the record shows unequivocally that SRI's interests were limited to the operation of Motiva and the refining and marketing of gasoline in the Eastern portion of the nation, and that, even there, SRI vigorously protested the domination of the Motiva Board by Shell and Texaco representatives. SRI lamented that the Motiva Board members, who were corporate representatives of Texaco and Shell, and many of whom were also members of the Equilon Board, appeared to be making their decisions for the nationwide "alliance" rather than for the individual joint ventures.[6] The record thus

---

[6] One board member who represented SRI in Motiva observed that, "once the Equilon Board takes a position on an issue common to both

demonstrates that—far from engaging in a nationwide conspiracy—SRI had little interest in acceding to the "cooperative" efforts by "common Motiva and Equilon Board members, from Shell and Texaco." In short, the plaintiffs failed to produce evidence that SRI had a "conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto*, 465 U.S. at 764. Although the issue is a close one, we affirm the district court's holding that the plaintiffs failed to establish that SRI participated in the operation of a nationwide price-fixing alliance or in the fixing of prices in the Western region of the United States.

IV. Liability under the Sherman Antitrust Act

"No antitrust violation is more abominated than the agreement to fix prices. With few exceptions, 'price-fixing agreements are unlawful *per se* under the Sherman Act and . . . no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense.' The dispositive question generally is not whether any price fixing was justified, but simply whether it occurred." *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1144 (9th Cir. 2003) (citations omitted) (alteration in original). The question we confront in this case, however, is not whether two companies engaged in run-of-the-mill price fixing. Instead, the defendants have asked us to find an exception to the *per se* prohibition on price-fixing where two entities have

---

Motiva and Equilon, Shell and Texaco will have a strong desire to have the same action taken in Motiva." The member further stated:

> As is exhibited by Motiva's incorrect reference to the Alliance, rather than Motiva, at the bottom of page 7 and the top of page 8 of the attached Business Plan write-up, the 'focus on Motiva' message will have to be repeated often to get it accepted. The more we allow "Alliance" to dominate, the greater the likelihood that personal behavior will favor "Alliance" over Motiva and the greater the likelihood that sub-optimizations of Motiva, in favor of the Alliance, will occur. We are on alert in this regard but the "Alliance" force is a large one.

established a joint venture that unifies their production and marketing functions, yet continue to sell their formerly competitive products as distinct brands. In doing so, the companies fixed the prices of those two brands of gasoline, Texaco and Shell, by agreeing *ex ante* to charge the exact same price for each. We think the exception the defendants seek is inconsistent with the Sherman Act as it has been understood to date.

The Sherman Antitrust Act makes illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations[.]" 15 U.S.C. § 1. The Supreme Court has declined to read this language literally. *See Nat'l Soc'y of Prof'l Engineers v. United States*, 435 U.S. 679, 687 (1978) (noting that § 1 of the Sherman Act "cannot mean what it says"). Instead, the Court has created a two-tiered mode of analysis.

> In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality—they are "illegal *per se*." In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed. In either event, the purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of members of an industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress.

Prof'l Engineers, 435 U.S. at 692. All parties agree that the relevant question in this case is whether the defendants' conduct falls under the first category of analysis.[7]

---

[7] The plaintiffs have also suggested that if we reject their *per se* approach, we should employ the "quick look" theory of review to find

If the plaintiffs can establish that the defendants' conduct falls within the range of conduct considered illegal *per se*, it does not matter whether the particular application of the *per se* rule appears inefficient or unfair. As the Court has explained,

> The costs of judging business practices under the rule of reason, however, have been reduced by the recognition of per se rules. Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable. As in every rule of general application, the match between the presumed and the actual is imperfect. For the sake of business certainty and litigation efficiency, we have tolerated the invalidation of some agreements that a fullblown inquiry might have proved to be reasonable.

Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 343-44 (1982) (citations omitted).[8] The Court has held consistently that the injustice of the rule's broad and uniform application must be addressed to Congress, not the judiciary. *See Prof'l Engineers*, 435 U.S. at 692.

Price fixing is the quintessential example of a *per se* violation of § 1. Numerous cases support this basic

---

defendants liable. Quick look analysis applies when *per se* review is inapplicable but when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question have an anti-competitive effect on customers and markets." *California Dental Ass'n v. Federal Trade Commission*, 526 U.S. 756, 770 (1999). As the district court rightly noted, "[m]uch like per se treatment, quick-look analysis applies 'when the great likelihood of anticompetitive effects can easily be ascertained.'" (quoting *California Dental*, 526 U.S. at 770). Because we hold that the plaintiffs have made a sufficient showing with respect to the illegality of the alliance's price fixing system under the *per se* rule, we need not decide whether that scheme would survive "quick look" review.

[8] The *Maricopa* Court noted in a footnote that price fixing is "[a]mong the practices which the courts have heretofore deemed to be unlawful in and of themselves." *Id.* at 344 n.15 (quoting *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 5 (1958)) (parallel citation omitted).

principle. *See Fed. Trade Comm'n v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 433 (1990) (explaining that there is a *per se* rule against price fixing having the "same force and effect as any other statutory commands"); *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 107-08 (1984) ("Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit.") (citation omitted) (hereinafter: *NCAA*); *Maricopa County*, 457 U.S. at 351 ("The anticompetitive potential inherent in *all* price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some. Those claims of enhanced competition are so unlikely to prove significant in any particular case that we adhere to the rule of law that is justified in its general application."); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980) ("It has long been settled that an agreement to fix prices is unlawful per se. It is no excuse that the prices fixed are themselves reasonable.") (citations omitted); *Prof'l Engineers*, 435 U.S. at 692 (noting that "[p]rice is the 'central nervous system of the economy'" and holding that "an agreement that 'interferes with the setting of price by free market forces' is illegal on its face") (citation and alteration omitted).

Notwithstanding the above, it is plain that § 1's blanket prohibition on price fixing, like the Act itself, cannot be read literally. *Cf. Prof'l Engineers*, 435 U.S. at 687 (§ 1 of the Sherman Act "cannot mean what it says"). There are *some* price fixing arrangements that violate the letter of the Sherman Act but are legal nonetheless. For instance, when two competing companies agree to merge and to combine their product lines, or to eliminate the old product lines and create an entirely new one, they generally agree to adopt a uniform pricing scheme. The Supreme Court has permitted such arrangements. In addition, in *Maricopa County*, the Supreme Court noted in dicta that in joint ventures where "persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities

for profit," the ventures are considered, for some purposes at least, to be "single firm[s] competing with other sellers in the market." 457 U.S. at 356; *see also Broad. Music, Inc. v. Columbia Broad. Sys. Inc.*, 441 U.S. 1, 9 (1979) ("When two partners set the price of their goods or services they are literally 'price fixing,' but they are not per se in violation of the Sherman Act.") (hereinafter: *BMI*) (citation omitted).

It is not the case, however, that the mere existence of a bona fide joint venture means that participating companies may use the enterprises to do anything they please with full immunity from *per se* analysis under § 1, including price fixing. As the district court correctly stated when ruling on the motion to dismiss, the issue with respect to legitimate joint ventures is whether the price fixing is "naked" (in which case the restraint is illegal) or "ancillary" (in which case it is not). *Accord* XI HOVENKAMP ¶ 1908, at 228-30 (arguing that "a restraint does not qualify as 'ancillary' merely because it accompanies some other agreement that is itself lawful" and that "a restraint is not saved from the 'naked' classification simply because it is included in some larger joint venture arrangement that is clearly efficient"). For instance, if in reliance on the existence of a valid joint venture between Coca Cola and Pepsi designed to research new types of soda flavors, the two companies imposed a price floor on all soda sold nationwide, the price fixing would constitute an illegal "naked restraint on trade." Along these lines, the Supreme Court has recognized that even joint ventures that are lawful in their general operations may violate the Sherman Act when they engage in specific anticompetitive conduct. *See NCAA*, 468 U.S. at 110 (holding that an agreement among NCAA schools restricting the broadcasting of football games was an invalid "naked restraint on price and output" but not questioning the validity of the association itself); *BMI*, 441 U.S. at 23 (holding that joint ventures are not "*usually* unlawful, at least not . . . where the agreement on price is *necessary* to market the product at all") (emphasis added); *Timken Roller Bearing*

Co. v. United States, 341 U.S. 593, 598 (1951) ("The fact that there is common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws. . . . [A]greements between legally separate persons and companies to suppress competition among themselves and others [cannot] be justified by labeling the project a 'joint venture.'") (citation omitted); *see also* XI HOVENKAMP ¶ 1908, at 228-29 (1998) (noting that the Supreme Court has often condemned joint ventures' price- or output-fixing provisions while leaving "the balance of the joint venture intact").

The defendants' argument to the contrary—that joint ventures such as Equilon and Motiva are incapable of violating the Sherman Act—ignores the lesson of *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969), as well as that of *NCAA*, *BMI*, and *Timken*. In *Citizen Publishing*, the Supreme Court confronted a joint venture similar to the one between Equilon and Motiva. The defendants in that case were the two daily newspapers in Tucson, Arizona. They entered into a joint venture agreement, which "provided that each paper should retain its own news and editorial departments, as well as its corporate identity." 394 U.S. at 133. The joint venture established a new company, Tucson Newspapers, Inc., "which was to manage all departments of their business except the news and editorial units. The production and distribution equipment of each paper was transferred to TNI." *Id.* at 133-34. The purpose of the agreement, like the purpose of the Alliance, was "to end any business or commercial competition between the two papers." *Id.* at 134.[9]

[9] Also similar to the agreements forming Equilon and Motiva, the *Citizen Publishing* agreement imposed several anticompetitive controls: first, the joint venture consolidated pricing and set joint subscription and advertising rates; second, the venture pooled all profits and losses pursuant "to an agreed ratio"; and third, the two parent corporations agreed not to compete against each other or the joint venture in the relevant market areas. *Id.*

The Supreme Court held that the confluence of these anti-competitive restraints, in the context of a joint venture between two formerly-vigorous competitors in the market area targeted by the venture, constituted a *per se* violation of the Sherman Act.

> The § 1 violations are plain beyond peradventure. Price-fixing is illegal per se. Pooling of profits pursuant to an inflexible ratio at least reduces incentives to compete for circulation and advertising revenues and runs afoul of the Sherman Act. The agreement not to engage in any other publishing business in Pima County was a division of fields also banned by the Act. The joint operating agreement exposed the restraints so clearly and unambiguously as to justify the rather rare use of a summary judgment in the antitrust field.

Id. at 135 (internal citations omitted). Cases like *Maricopa County* and *BMI* do seem to suggest that the Court, if confronted with a similar joint venture today, might not find the enterprise as a whole unlawful. The Court has, however, continued to enforce the Sherman Act's *per se* prohibition on price fixing, and has scrutinized joint ventures to ensure that they do not contain "naked" restraints on trade. *See, e.g.*, *NCAA*, 468 U.S. at 109. Nothing in the cases suggests that the Court would overrule *Citizen Publishing* in its entirety, abandon its holding that the price fixing in which the joint venture engaged was illegal *per se*, or eliminate the rule that "naked" price-fixing by a joint venture violates the Sherman Act.

The district court distinguished *Citizen Publishing* in three ways. Each is unsatisfactory. First, the court found that the Tucson newspapers in *Citizen Publishing* effectively eliminated "all competition," whereas Equilon and Motiva "continue to compete with several major oil companies in their relevant markets." This distinction runs contrary to Supreme Court precedent. *See Fed. Trade Comm'n*, 493 U.S. at 434, 436 (noting that even "a small conspirator may

be able to impede competition" and holding that "[c]onspirators need not achieve the dimensions of a monopoly, or even a degree of market power any greater than that already disclosed by this record, to warrant condemnation under the antitrust laws").[10]

Second, the district court found that the *Citizen Publishing* newspapers "combined for the specific purpose of restricting competition and fixing prices," in contrast to a complete lack of evidence establishing such intent for the alliance ventures. That distinction, if true, would speak only to the validity of Equilon and Motiva as a whole—it would not justify the defendants' adoption of a price fixing scheme. Moreover, the court's finding was contrary to its obligation to accept the version of disputed facts most favorable to the plaintiffs. Several of the defendants' witnesses admitted during depositions that the decision to unify the pricing of the Texaco and Shell brands was made contemporaneously with the formation of the alliance, but before the actual joint ventures officially existed, and that the very purpose of the alliance was to eliminate competition in order to realize efficiency gains and gain market share.[11] The plaintiffs

---

[10] *See also NCAA*, 468 U.S. at 109-10 ("As a matter of law, the absence of proof of market power does not justify a naked restraint on price or output. . . . This naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis.").

[11] Thus, contrary to our dissenting colleague's understanding, the pricing decision was not made by a single economic entity. *See* Post, at 31a, *id.* at 32a ("[N]othing more radical is afoot than the fact that an entity, which now owns all of the production, transportation, research, storage, sales and distribution facilities for engaging in the gasoline business, also prices its own products. It decided to price them the same, as any other entity could."). At this stage of the litigation, we are required to draw all reasonable inferences in favor of the plaintiffs. Viewing the evidence in that light, there is at least a triable issue of fact as to whether Texaco and Shell agreed in advance to charge the same price for their two distinct gasoline brands as an initial operating requirement of the alliance. The decision by Texaco and Shell to include in their joint ventures a unified pricing scheme was not a decision made by a single economic entity—it was a decision made by competitors. Whether the agreement constituted

created a sufficient issue of material fact as to whether the intended purpose of the unified pricing scheme was to restrict competition.

Third, the district court believed that the only reason the non-competition agreement in *Citizen Publishing* was unlawful was because the agreement joined the only two competitors in the market. The Western oil market, by contrast, is a diverse market with "several competitors," while the Equilon joint venture has a much narrower non-competion agreement. This distinction returns to an analysis of market power, an analysis which the Supreme Court has held is inappropriate in this type of case. *See Federal Trade Comm'n*, 493 U.S. at 434-35; *NCAA*, 468 U.S. at 110 ("We have never required proof of market power in such a case."). Moreover, the record shows both that Equilon exercised a substantial amount of control over the Western gasoline market, and that the two joint ventures helped divide the gasoline consumer field by jointly promoting and targeting the Texaco and Shell brands to better capture their relevant markets. None of the district court's distinctions is sufficient to justify ignoring *Citizen Publishing* and that decision's condemnation of price fixing by former competitors even when adopted as part of a joint venture arrangement.

In granting the defendants' summary judgment motion, the district court ruled that "a reasonable trier of fact could not find that the Defendants formed Equilon and Motiva merely to achieve an ulterior anticompetitive purpose or that the ventures are patently anticompetitive."[12] Even were that true, the district court stopped short of completing the

"a conspiracy [ ] in restraint of trade," 15 U.S.C. § 1, or whether such a conspiracy would exist regardless of when the decision to engage in unified pricing was made, is for the district court to determine on remand.

[12] The district court asked whether "Equilon and Motiva are either mere window-dressings for a price fixing conspiracy or . . . are otherwise patently anticompetitive."

requisite inquiry. The proper inquiry for a *per se* analysis of price fixing is not simply whether the joint venture itself is anticompetitive. Nor is the relevant question simply whether the defendants intended to destroy competition. *See Paladin Associates, Inc. v. Montana Power Co.*, 328 F.3d 1145, 1153-54 (9th Cir. 2003) (holding that evidence of an intent to destroy competition or engage in predatory price controls is not essential to demonstrating the existence of an illegal agreement). Rather, if the answer to those questions is in the negative, we must then decide whether the defendants' conduct—setting one, unified price for both the Texaco and Shell brands of gasoline instead of setting each brand's price independently on the basis of normal market factors[13]—is reasonably necessary to further the legitimate aims of the joint venture. *See Freeman*, 322 F.3d at 1151 (holding that plainly anticompetitive conduct by otherwise valid joint ventures must be "reasonably ancillary to the legitimate cooperative aspects of the venture") (citation omitted).

The Supreme Court has upheld joint ventures and other corporate combinations involving fixed prices, but generally has done so only when it appeared plain to the Court that the restraints undertaken by the joint ventures were "necessary" to the legitimate aims of the joint venture. *See BMI*, 441 U.S. at 23 (approving an otherwise invalid price restraint only because "the agreement on price is necessary to market the product at all"); *NCAA*, 468 U.S. at 117 ("Our decision not to apply a per se rule to this case rests in large part on our recognition that a certain degree of cooperation is necessary if the type of competition that petitioner and its member institutions seek to market is to be preserved."); *id.* at 101 ("what is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all"); *accord* XI HOVENKAMP ¶ 1908, at 236 ("Joint sales endeavors may require joint price

[13] We assume that normal market factors would include the cost of production and marketing, supply, demand, and the like.

setting, particularly when the jointly produced product, such as the 'blanket' license in *BMI*, is something individual participants could not produce at all."). Courts have engaged in this "essentiality query," *id.* at 228, in order to ensure that a joint venture has a legitimate justification—other than the desire to enhance profits and market control—for adopting a particular restraint that would otherwise violate the Sherman Act. Thus, whether the *per se* rule applies to a legitimate joint venture's allegedly anticompetitive conduct depends first and foremost on a determination of whether the specific restraint is sufficiently important to attaining the lawful objectives of the joint venture that the anti-competitive effects should be disregarded.[14]

In considering the relationship of the enterprise's pricing actions to the venture's legitimate objectives, we find it significant that the defendants here did not simply consolidate the pricing decisions within the joint ventures—they *unified* the pricing of the two brands from the time the alliance was formed by designating one individual in each joint venture to set a single price for both brands.[15]

---

[14] As one commentator has explained,

> Once a court finds the joint venture proper, it can easily determine the appropriateness of any related competitive restraints among the parties to the venture. A court should simply consider whether such restraints are necessary to promote the venture's procompetitive purposes. If a joint venture itself is procompetitive, the courts should uphold any restrictions on competition necessary to achieve its legitimate purposes. . . . The defendant should have the burden of proving that a competitive restraint is required to further a venture's efficiency objectives. If a defendant fails to meet this burden, a court should preclude the restraint without any further inquiry.

Thomas A. Piraino, Jr., *A Proposed Antitrust Approach to Collaborations Among Competitors*, 86 Iowa L. Rev. 1137, 1188-89 (2001).

[15] As stated earlier, this single price was subject to variations depending upon geographic markets, such that the price of the Texaco and Shell brands might be higher in San Diego, California than it was in Lincoln, Nebraska. The two brands, however, were always priced together in each geographic market—the price never varied as between the two.

Normally, a business determines the prices it will charge for its various products by considering numerous factors, just a few of which include the costs of production and marketing and the contours of the relevant product markets. In this case, the defendants have stressed that, in addition to the differences in the product themselves, the gasolines marketed under the Texaco and Shell labels have different reputations and consumer bases. It thus seems likely that independent price analyses would result, at least in some circumstances, in the rational decision to sell the different brands at different prices. Instead, the defendants chose to fix those prices uniformly.

The defendants have thus far failed to offer any explanation of how their unified pricing of the distinct Texaco and Shell brands of gasoline served to further the ventures' legitimate efforts to produce better products or capitalize on efficiencies. Nor does the record contain facts sufficient to warrant our drawing any such inference. To the contrary, the record before us reveals that the alliance never considered unified pricing to be relevant to product improvement or efficiency gains. As one oil company executive explained, all of the anticipated cost savings, which were calculated prior to formation of the joint ventures, had "nothing to do with pricing." The absence of persuasive evidence showing a procompetitive justification for initiating the price-fixing scheme, when viewed along with the plaintiffs' evidence showing anti-competitive effects, convinces us that the plaintiffs have made a sufficient showing as to the applicability of the *per se* rule.[16]

---

[16] Indeed, the record is close to establishing that the price-fixing scheme was sufficiently unrelated to accomplishing the legitimate objectives of the joint venture as to justify granting the plaintiffs' motion for summary judgment. However, given the complexity of the economic arrangements at issue, the sparseness of the record, the district court's failure to apply the appropriate test, and our general presumption against granting summary judgment in such cases, we conclude that the denial of both sides' motion for summary judgment is appropriate here.

The defendants offer only two justifications for the unitary pricing scheme. First, the defendants argue—as does our dissenting colleague—that, as a general rule, any bona fide joint venture must be able to set prices for its products at whatever level it chooses: "without the ability to price its products, neither venture would have had the authority to make fundamental decisions affecting its financial performance." Appellees' Brief, at 16. Second, the defendants argue that Equilon and Motiva fixed uniform Texaco and Shell prices in order to "prevent issues of price discrimination from arising under the Robinson-Patman Act[.]" *Id.* We address the latter justification first.

A cursory examination of the Robinson-Patman Act, 15 U.S.C. § 13,[17] which was designed to prevent sellers from engaging in price discrimination, reveals its inapplicability here. Under Robinson-Patman, sellers may not sell the same product at different prices on the basis of the identity of the buyer.[18] But in adopting the Act, "Congress did not intend to outlaw price differences that result from or further the forces of competition." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220 (1993). Robinson-Patman was aimed at evils entirely absent here. As another Circuit has explained,

> The [Act] was . . . motivated by concerns for small, independent distributors, which in the 1930's were threatened by the arrival of chain stores. It marked "the high-water mark of the anti-chain-store movement." Although the Clayton Act had prohibited certain price

[17] The Act provides that "[i]t shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality[.]" 15 U.S.C. § 13(a).

[18] The Act explicitly excludes price differentials "which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered[.]" 15 U.S.C. § 13(a).

> discriminations, it was seen as ineffective in stopping the discriminatory prices granted chain stores by virtue of their size. So far as purchasing was concerned, this discrimination put the more normal "mom and pop" merchants of the day at a competitive disadvantage. Congress [enacted Robinson-Patman] to alleviate the disadvantage by putting the new age retailing behemoths on a level "playing field" with small independent merchants and businessmen. . . .
>
> As is obvious from this brief summary of the RPA's history, "it is fairness, as Congress perceives it, that Robinson-Patman is all about." The Act's goal is to abolish unwarranted favoritism among all functional competitors, big or small. Its objective is to assure "that businessmen at the same functional level start on equal competitive footing so far as price is concerned"; "to assure that all sellers regardless of size, competing directly for the same customers . . . receive evenhanded treatment from their suppliers" . . . .

Alan's of Atlanta, Inc. v. Minolta Corp., 903 F.2d 1414, 1422 (11th Cir. 1990) (internal citations, alterations, and footnote omitted).

The quoted passage makes it clear that the defendants' Robinson-Patman argument is wholly without merit. The Act would unquestionably be inapplicable to a decision by the defendants to sell the distinct Texaco and Shell brands of gasoline at different prices. Any such decision would necessarily be predicated on the differences between the two brands, not upon the identity of the buyers. The record shows that the alliance never intended to market or sell the two brands as the same product. Rather, it went to great lengths to differentiate carefully between the brands. Mostly, this took place at the additive stage—where generic "fungible" gasoline is transformed into a specific brand. But it also took place at the marketing stage, where the Texaco and Shell brands of gasoline were always targeted at

different groups of consumers. The defendants cite no precedent or provision of statutory law that would support applying Robinson-Patman to a decision to use different prices for distinct, though similar, products. Finally, this Circuit has rejected "the argument relying on the 'underlying notion of fairness of offering the same services at the same prices to all participants.' The 'fairness' of uniform pricing is not a relevant consideration in an antitrust case; consumers are presumed to prefer lower prices to the satisfaction of knowing they paid the same inflated price as everyone else." *Freeman*, 322 F.3d at 1151.

The first of the defendants' two arguments—that a joint venture must be able to set whatever price it chooses for its products—proves too much. If that were true, any number of companies could create joint ventures as fronts for price-fixing. The simple answer is that the Supreme Court has declined to immunize joint ventures from *per se* antitrust scrutiny. *See NCAA*, 468 U.S. at 109; *BMI*, 441 U.S. at 23; *Citizen Publishing*, 394 U.S. at 135; *Timken*, 341 U.S. at 598. We too have rejected the plaintiffs' proposed rule. *See Freeman*, 322 F.3d at 1148 (holding that the fact that joint ventures "pursue the common interests of the whole" does not necessarily immunize them from antitrust scrutiny and noting that "cases finding joint ventures to be incapable of conspiracy are the 'exception'"). The leading treatise in the field has also expressed similar disapproval of the defendants' claim. *See* XI HOVENKAMP ¶ 1908, at 229 ("Such a rule could protect cartels from the heightened scrutiny attending naked restraints through the simple device of attaching the cartel agreement to some other, independently lawful transaction.").

Finally, the defendants claim—as does our dissenting colleague—that an application of the *per se* rule here would mean that joint ventures could not set prices for their products. We reject this argument. We of course recognize that joint ventures may price their products; that is not the question. The question is whether two former (and

potentially future) competitors may create a joint venture in which they unify the pricing, and thereby *fix* the prices, of two of their distinct product brands. We have held that the Sherman Act's *per se* rule applies when the defendant fails to demonstrate a sufficient relationship between the price fixing scheme and furthering the legitimate aims of the joint venture—a relationship that justifies the otherwise prohibited price restraints. Thus far in this litigation, the defendants have failed to produce sufficient evidence demonstrating that their price fixing scheme was ancillary rather than naked and, thus, that they are entitled to summary judgment.

The result we reach here allows joint ventures to set prices for their products within the limits of the Sherman Act. Our analysis would be different if we confronted a joint venture in which former competitors agreed jointly to research, produce, market, and sell a new product, or a joint venture in which competitors agreed to merge their current product lines into one collective brand. Nor would we necessarily reach the same result if the defendants had independently decided to charge the same price for Texaco and Shell gasoline after conducting separate price analyses for each brand, or had they come forward with persuasive evidence that the setting of a single, fixed price was important to accomplishing the legitimate aims of the joint ventures.

We do not share the defendants' concern that validating the application of the *per se* rule to the pricing decisions of joint ventures will risk invalidating countless economically efficient business integrations. The plaintiffs have come forward with sufficient evidence to create a triable issue of fact as to whether the defendants engaged in a naked restraint on trade, prohibited *per se* by the Sherman Act. Whether the defendants will be found liable at trial remains to be seen. But if they are, and if that individual application of the *per se* rule is economically inefficient, that concern must be addressed to Congress, not the judiciary. *See*

Maricopa County, 457 U.S. at 354-55; *Professional Engineers*, 435 U.S. at 692.[19]

We therefore hold that the district court erred in finding no triable issue of fact with respect to the plaintiffs' *per se* claim. The plaintiffs have presented sufficient evidence to create a triable issue of fact as to whether the alliance's unified pricing scheme was a *per se* violation of § 1 of the Sherman Act.

CONCLUSION

For the reasons stated above, we AFFIRM the district court's award of summary judgment to defendant Saudi Refining, Inc., REVERSE the district court's award of summary judgment against the Plaintiffs-Appellants, and REMAND for further proceedings consistent with this opinion.

FERNANDEZ, Circuit Judge, Concurring and Dissenting:

I agree that the plaintiffs lacked standing as to SRI and, therefore, concur in the result of part III of the majority opinion. However, I dissent from part IV.

---

[19] Congress's response to *Citizen Publishing* further convinces us that we should not carve out an exception to the Sherman Act simply because the type of venture at issue here may be economically efficient. Shortly after the decision, Congress passed the Newspaper Preservation Act, 15 U.S.C. §§1801-1804, which specifically exempted from the Sherman Act newspaper operating arrangements like the one in *Citizen Publishing*. *See Hawaii Newspaper Agency v. Bronster*, 103 F.3d 742, 744-45 (9th. Cir. 1996). After surveying the relevant "economic conditions," Congress determined that the specific type of joint venture at issue was beneficial and even necessary in a "large majority of American communities." H.R. Rep. No. 91-1193, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 3547, 3548. Those economic conditions, in Congress's view, justified more lenient antitrust review of newspaper industry joint ventures than the Court had applied in *Citizen Publishing*. Congress has made no such findings, nor has it passed any similar law, relevant to the oil and gasoline industry, which certainly is not without its supporters in the Legislative and Executive Branch. If Congress wishes to exempt oil and gasoline enterprises from the Sherman Act's *per se* prohibition of price fixing, it may certainly do so, but it is beyond our authority to read new exceptions into the Act.

While this case does involve a very complicated set of transactions, it presents a rather straightforward antitrust law question. That is, where former competitors create a bona fide joint venture to which all of their assets and operations in segments of their businesses are contributed, will there be a *per se* violation of the antitrust laws, if the joint venture entity sets the prices of the goods it sells? I think the answer is no.

Here, Shell and Texaco formed Equilon Enterprises, LLC in the western United States, and Motiva Enterprises, LLC in the eastern United States.[20] There can be no doubt that each of the new entities is a true, bona fide, economically integrated joint venture. Refineries, lubricant plants, research laboratories, thousands of service stations, thousands of miles of pipeline, thousands of employees, and over 100 terminals were contributed to the ventures. Upon those transfers, Shell and Texaco ceased refining and marketing operations in both the western and the eastern United States. They were no longer in those businesses within the United States; the joint ventures were.[21] In other words, Equilon now manufactured, inventoried, transported, and marketed the products. It ran the refinery; it had the research facilities; it transported products; and it dealt with the station operators and other buyers. It also priced the products, and set the same price for *its* Shell and Texaco brands.

While Independent Operators do not assert that the placing of the whole manufacturing, transport and marketing

---

[20] Henceforth, I shall only refer to Equilon because it is the entity that directly affects plaintiffs in this case—Independent Operators.

[21] We have previously had occasion to describe the nature of Equilon. *See Abrahim & Sons Enters. v. Equilon Enters., LLC*, 292 F.3d 958, 960 (9th Cir. 2002). As we stated, an LLC is an entity truly distinct from its members and its acts "are deemed independent of the acts of its members." *Id.* at 962. It is a separate juridical person. *Id.* LLCs are much like corporations, and, though controlled by their members, "LLCs remain separate and distinct from their members." *Id.*

functions in a single entity violated 15 U.S.C. § 1, they do assert that having the pricing function in Equilon did violate the antitrust laws *per se*. The majority thinks that might be true; I do not.

It is plain enough that the mere creation of a joint venture is not a *per se* antitrust violation. No doubt, like mergers, joint ventures are combinations of business assets but "such combinations are judged under a rule of reason" analysis. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768, 104 S. Ct. 2731, 2740, 81 L. Ed. 2d 628 (1984). Especially should that be true of the LLC type of venture, which is not only a separate entity, but which also functions as a separate economic unit for all practical purposes. *See Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1053 (9th Cir. 1983). In fact, to slightly paraphrase the Supreme Court statement in *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 356, 102 S. Ct. 2466, 2479, 73 L. Ed. 2d 48 (1982):

> [Equilon is] . . . analogous to partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit. In such joint ventures, the partnership is regarded as a single firm competing with other sellers in the market.

Nor does the mere fact that Equilon sets prices for the products it manufactures and sells suffice to demonstrate that its actions were price fixing for antitrust purposes. *See Broad. Music, Inc., v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 8-9, 99 S. Ct. 1551, 1556-57, 60 L. Ed. 2d 1 (1979). Rather, "[l]iteralness is overly simplistic and often overbroad. When two partners set the price of their goods or services they are literally 'price fixing,' but they are not *per se* in violation of the Sherman Act." *Id.* at 9, 99 S. Ct. at 1557. So just what could make the operation of Equilon a *per se* violation of the antitrust laws? Surely it is not a claim that the venture is a

sham. *See Addamax Corp. v. Open Software Found., Inc.*, 152 F.3d 48, 52 (1st Cir. 1998). No one seriously asserts *that*.

Nor can it be that this is a case like *Citizen Publ'g Co. v. United States*, 394 U.S. 131, 89 S. Ct. 927, 22 L. Ed. 2d 148 (1969). There, two newspapers formed a third corporation for the principal purpose of eliminating competition, but each remained in the same business in the same area, and retained the production of the true product—news and editorials—in its own hands. *Id.* at 133, 89 S. Ct. at 928. Moreover, the newspapers themselves—not the new entity—jointly set the subscription and advertising rates. *Id.* at 134, 89 S. Ct. at 928. None of that is true here. Equilon owned all of the assets, all of the obligations, and, in a word, the whole business. It set the prices. It was a separate entity; a fact that the Independent Operators seem unable or unwilling to grasp.

But, Independent Operators argue, in this case the fixing of prices by the venture is neither essential nor "reasonably ancillary to the legitimate cooperative aspects of the venture." *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1151 (9th Cir. 2003). The majority agrees; I cannot understand why. The situation here is far from the kind of situation we faced in *Freeman*. There, the reason for the venture was the unifying of disparate multiple listing databases. *Id.* at 1140-41. That done, there was a new database entity, and the corporations that formed it for that purpose went on operating their own businesses. But they all also agreed to fix a price for support services. That was essentially unrelated to the database itself, and was unnecessary, and unjustified. *Id.* at 1151. It was the latter "price fix" that ran afoul of antitrust principles. Here we have nothing of the kind.

In this case, nothing more radical is afoot than the fact that an entity, which now owns all of the production, transportation, research, storage, sales and distribution facilities for engaging in the gasoline business, also prices its

own products. It decided to price them the same, as any other entity could. What could be more integral to the running of a business than setting a price for its goods and services? I am at a loss for an answer to that question, and nothing written about this case to date imparts additional wisdom or better information.

Yet Independent Operators insist that the setting of the prices is a violation. That is, separate juridical business entity though it is, Equilon can really only be the semblable of a true business, for if it, like any other economic actor, desires to price its own goods, its members may well be subject not merely to commination, but to outright denunciation by the courts as *per se* violators of the antitrust laws. It means that this entity must ask a separate juridical entity—for example, Shell, which does not itself own any of the facilities or products—to decide what price should be charged by Equilon.[22] Again, the majority thinks that might be so; I do not.

We now have an exotic beast, no less strange than a manticore, roaming the business world. This beast would otherwise be a true business, but when it acts like a true business—sets prices for its own goods—it subjects its otherwise insulated members to the severe sting of antitrust liability. While it has the head of a business man and the body of an entrepreneurial lion, it has the tail of a liability scorpion. I suppose I am as taken with stories of exotic beasts as the next person, but I prefer to leave them in the realm of the unknown; I would rather not confront them in the marketplace.

[22] Shell, by the way, is a mere member of Equilon and is shielded from liability for the debts or obligations of Equilon, just as corporate shareholders are shielded. *See* Cal. Corp. Code § 17101.

In short, I do not believe that the Independent Operators have pointed to a *per se* antitrust violation,[23] and they do not even attempt to assert a full rule of reason claim.

Thus, I respectfully dissent as to part IV of the majority opinion.

[23] Similarly, no "quick look" violation is shown. *See Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770, 119 S. Ct. 1604, 1612, 143 L. Ed. 2d 935 (1999); *Bogan v. Hodgkins*, 166 F.3d 509, 514 n.6 (2d Cir. 1999).

[Filed May 21, 2002]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FOUAD N. DAGHER, et al.,	)	CV 99-6114-GHK(JWJx)
	)	
Plaintiffs,	)	
	)	MEMORANDUM AND
v.	)	ORDER
	)	RE: JOINT BRIEFINGS
SAUDI REFINING, INC.,	)	ON MOTIONS FOR
et al.,	)	SUMMARY JUDGMENT
	)	(PART ONE: Re:
Defendants.	)	PLAINTIFFS'
	)	STANDING AGAINST
	)	SRI)

I. Introduction

This matter is before the court on the parties' joint briefings on motions for summary judgment. The motions came on regularly for hearing on December 10, 2001. We rule as follows on SRI's motion with respect to standing after considering the joint briefs, all pertinent papers, the evidence, and oral argument:

II. Procedural History

On June 15, 1999, Plaintiffs Fouad N. Dagher et al. commenced this action on behalf of themselves and approximately 23,000 Shell and Texaco branded service station owners nationwide. On January 28, 2001, in an amended order, we granted in part and denied in part Defendants' Rule 12(b)(6) motion to dismiss. We granted the motion insofar as Plaintiffs based a § 1 claim on division of markets and customers, and manipulation of service station leases. We denied the motion to the extent Plaintiffs alleged a § 1 price fixing conspiracy through the vehicle of two joint ventures: Equilon Enterprises LLC ("Equilon"),

located in the Western United States, and Motiva Enterprises LLC ("Motiva"), located in the Eastern United States.

Though Plaintiffs amended their complaint to reallege market division and lease manipulation, Pls.' Second Am. Compl. ¶¶ 99-100, 103, they have since explicitly waived reliance on either theory as an independent basis for § 1 liability. *See, e.g.*, Tr. Of Hearing on Mot. to Dismiss, 14:23-15:6; 15:24-16:8 (December 6, 1999). In addition, Plaintiffs have limited themselves to the per se and quick-look doctrines, forsaking the traditional rule of reason analysis. We approach the cross-motions for summary judgment in light of this particular procedural posture.

III. Undisputed Facts[1]

A. Terminology

Major oil companies describe operations as "upstream" or "downstream." Joint Facts ¶ 12. Upstream operations consist of exploring for and producing crude oil. *Id.* Downstream operations entail refining crude into gasoline and other products, and marketing the finished goods. *Id.*

For Defendants, the wholesale level consists of selling branded gasoline in bulk to retailers and resellers. *Id.* ¶ 15. Retailers sell branded gasoline to consumers at service stations. *Id.*

B. Pre-Formation Negotiations

Prior to the formation of the joint ventures, Shell Oil Company ("Shell"), Texaco, Inc. ("Texaco") and Star

[1] Pursuant to an earlier order, the parties filed a "Joint Stipulation of Uncontroverted Facts and Conclusions of Law" on July 27, 2001. On October 5, 2001, they filed a new copy to conform with changes in the Local Rules and incorporate the deposition testimony of a Defense witness. For ease of reference, the facts stipulated to by all parties are herein referred to as "Joint Facts." Additional statements of uncontroverted facts will be referred to as "Pls.' Facts" or "Defs.' Facts."

The parties also refiled a "Joint Stipulation of Parties with Respect to Issues to be Decided for Summary Judgment," hereinafter cited as "Joint Argument."

Enterprise ("Star")[2] independently refined and marketed gasoline at both the wholesale and retail levels through their own marketing departments. *Id.* ¶¶ 15, 25, 62. Each Defendant set wholesale prices within its own refining and marketing organization. *Id.* ¶¶ 26-27.

Shell, Texaco and Saudi Refining, Inc. ("SRI") considered the downstream refining and marketing business intensely competitive and expected the intense competition to continue. *Id.* ¶ 31. In March of 1996, Shell and Texaco discussed, among other things, consolidation of their downstream assets in the United States. *Id.* ¶ 33. Star joined the discussions at some point thereafter. *Id.* ¶ 34.

Shell, Texaco and Star believed the oil industry was about to enter a period of consolidation. *Id.* ¶ 35. They established a synergy team and steering committee with employees from all three companies to explore the possibility of consolidation. *Id.* ¶ 36. The synergy team exchanged information on historical refining and marketing margins, and revenue and profitability forecasts. *Id.* ¶¶ 37-38.

In June of 1996, the team reported that combining downstream operations could potentially reduce costs by $800 million annually, $550 million attributable to Equilon and $250 million attributable to Motiva. *Id.* ¶ 39. Encouraged, Texaco, Shell and SRI formed negotiating teams to formulate terms for a combination. *Id.* ¶ 40. During the negotiations, Texaco and Shell established a standstill agreement under which Shell agreed not to initiate a takeover of Texaco for a specified period. *Id.* ¶ 41.

C. Formation / Terms of Formation

Equilon was formed on January 1, 1998, and Motiva was formed on July 1, 1998. *Id.* ¶¶ 6-7. Under the Equilon agreement, Shell and Texaco allocated gains and losses in

[2] From 1989 to 1998, Saudi Refining, Inc. and Texaco operated a joint venture, Star Enterprise, in the Eastern United States. Joint Facts ¶ 4. Star refined and marketed gasoline under the Texaco brand. *Id.*

proportion to the assets contributed at formation: Shell 56% and Texaco 44%. *Id.* ¶ 43. Similarly, Shell, Texaco and SRI shared risks and losses in proportion to the assets contributed to form Motiva:[3] Shell 35% and Texaco and SRI 32.5% each. *Id.* ¶¶ 46-47.

The downstream assets in Equilon and Motiva include twelve refineries, twenty-three lubricant plants, two research laboratories, 22,000 branded service stations, over 24,000 miles of pipeline, 107 terminals, and approximately 24,000 employees. *Id.* ¶ 48. Shell and Texaco did not include their marine fuel businesses or upstream operations. *Id.* ¶¶ 49-50. Texaco and Shell also did not transfer ownership of their trademarks to Equilon or Motiva. *Id.* at ¶ 52.

Equilon and Motiva market gasoline under the Shell and Texaco brands[4] pursuant to written license agreements. *Id.* ¶¶ 52-53. The licenses are subject to Brand Management Protocol agreements that generally require that both brands be preserved and treated equally. *Id.* ¶¶ 54-55. In addition, a Brand Management Council oversees the use and management of the Shell and Texaco brands. *Id.* ¶ 56.

Shell and Texaco agreed not to compete with Equilon, and agreed not to manufacture and market certain products in Equilon's geographic area (the Western United States), including fuel, synthetic gasoline and electricity. *Id.* ¶ 58. Shell, Texaco and SRI agreed not to compete with Motiva, and agreed not to manufacture and market certain products in Motiva's geographic area (the Eastern United States), including fuel, synthetic gasoline and electricity. *Id.* ¶ 59. Under the Motiva agreement, SRI retained the option of refining and marketing in the Western United States. *Id.* ¶ 60.

[3] Star was terminated, and its assets unwound. *Id.* at ¶ 44.

[4] To some extent, Shell and Texaco brands appeal to and target different customers. *Id.* at ¶ 66. Texaco customers tend to be blue-collar and rural, while Shell customers are more affluent and urban. *Id.*

Equilon and Motiva have their own Chief Executive Officers ("CEO"). *Id.* ¶ 57. They can be dissolved at any time by mutual consent and unilaterally after five years, effective two years after notice. *Id.* ¶ 51.

D. Post-Formation

"The formation of Equilon ended competition between Shell and Texaco in the Western United States with respect to downstream refining and marketing of gasoline." *Id.* ¶ 42. "The formation of Motiva ended competition between Shell and Star in the Eastern United States with respect to the downstream refining and marketing of gasoline." *Id.* at ¶ 45. One person at Equilon sets prices for both Shell and Texaco brands in Equilon's pricing area, and one person at Motiva sets prices for both brands in Motiva's area. *Id.* ¶ 62.

Equilon and Motiva set prices in thousands of distinct geographic trade areas based on local conditions. *Id.* ¶¶ 18-21, 63. They refine, maintain and market Shell and Texaco branded gasoline directly to independent Texaco and Shell service station operators, who own or lease service stations from Equilon or Motiva. *Id.* ¶¶ 10, 61.

Plaintiffs never purchased gasoline from SRI, Star or Motiva. *Id.* ¶ 9.

IV. Summary Judgment

Summary judgment is appropriate when no dispute exists as to the material facts, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *see, e.g., Toscano v. Prof'l Golfers' Ass'n*, 258 F.3d 978, 982 (9th Cir. 2001). We view the evidence in the light most favorable to the non-movant. *County of Toulumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1154 (9th Cir. 2001) (*citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)). The non-movant can defeat summary judgment by demonstrating that the evidence, taken as a whole, could lead a rational trier of fact to find in its favor. *Id.* (*citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

The parties must "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). A party opposing summary judgment must direct our attention to specific, triable facts. Hon. William W. Schwarzer, et al., Cal. Practice Guide: Federal Civil Procedure Before Trial § 14:101.1, at 14-24.2 (2001). General references without page or line numbers are not sufficiently specific. *Id.* (*citing Nissho-Iwai Am. Corp. v. Kline*, 845 F.2d 1300, 1307 (5th Cir. 1988)); *see also Carmen v. S.F. Unified Sch. Dist.*, 237 F.3d 1026, 1030 (9th Cir. 2000) (citing similar holdings in the Fifth, Sixth, Seventh, and Tenth Circuits); *Forsberg v. Pac. Northwest Bell Tel. Co.*, 840 F.2d 1409, 1418 (9th Cir. 1988) ("The district judge is not required to comb the record to find some reason to deny a motion for summary judgment."). In the context of cross-motions for summary judgment, we consider specifically identified citations in either party's moving papers as well as their oppositions. *Fair Housing Council v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001).

V. Plaintiffs' § 1 Standing with Respect to SRI

Plaintiffs claim they have standing with respect to SRI as a purported co-conspirator with Shell and Texaco in a price fixing conspiracy. Because standing goes to the justiciability of Plaintiffs' claim against SRI, we address that issue first.[5]

A. Antitrust Conspiracy Case

Plaintiffs have the initial burden of proving a "contract, combination, or conspiracy between two or more entities" in violation of § 1 of the Sherman Act. 15 U.S.C. § 1; *In re Citric Acid Litig.*, 191 F.3d 1090, 1093 (9th Cir. 1999) (*citing Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 763 (1984)); *see also Am. Ad Mgmt., Inc. v. GTE Corp.*, 92 F.3d 781, 788 (9th Cir. 1996). To establish § 1 standing, Plaintiffs must prove SRI's antitrust violations, if any,

[5] This order resolves only the issue of Plaintiffs' standing against SRI. The remaining issues will be addressed separately in a subsequent order.

caused them harm. *See Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 2002 U.S. App. LEXIS 3418, *37-38 (9th Cir. 2002); *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 989 (9th Cir. 2000); *Am. Ad Mgmt., Inc. v. GTE Corp.*, 190 F.3d 1051, 1055 (9th Cir. 1998).

Since Plaintiffs never purchased products from Motiva, Star or SRI, and waived any claims based on market division, they could not suffer an actionable § 1 harm based on SRI's role in forming Motiva alone. Plaintiffs need some connection between SRI and the alleged price fixing in the Western United States. Therefore, Plaintiffs have set out to prove "that Shell, Texaco, and SRI combined and conspired with each other to fix prices, using the combinations Equilon and Motiva to implement their conspiracy . . . ." Joint Argument, p. 49. Second, "the formation of Equilon and Motiva was itself a violation of Section 1 as a conspiracy by defendants to fix prices." *Id.* "Thus Equilon's price-fixing was part of an Alliance-wide initiative, known to, joined in, and approved of by SRI . . . ." *Id.*, p. 55.

To be liable as a co-conspirator under § 1, a defendant must have a "conscious commitment to a common scheme designed to achieve an unlawful objective." *Toscano v. Prof'l Golfers' Ass'n*, 258 F.3d 978, 983 (9th Cir. 2001). The inference of conspiracy must be reasonable in light of the competing inference that the conduct was engaged in independently and must tend to exclude the possibility of independent action. *In re Citric Acid*, 191 F.3d at 1094 (*citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). Conduct as consistent with legitimate competition as illegal price fixing cannot, standing alone, support an inference of antitrust conspiracy. *Id.* (*citing Matsushita*, 475 U.S. at 588)).

Plaintiffs can raise a genuine issue of material fact by either producing direct evidence of an illegal conspiracy to fix prices, or through circumstantial evidence "from which a reasonable factfinder could conclude that [defendants]

conspired" to fix prices. *In re Citric Acid Litig.*, 191 F.3d at 1093. Direct evidence requires no inference to reach the proponent's desired conclusion. *County of Tuolumne*, 236 F.3d at 1155 (*citing In re Citric Acid*, 191 F.3d at 1093-94). "Direct evidence is that which can defeat a request for summary judgment 'if taken as true,' whereas circumstantial evidence can defeat a summary judgment motion only if inferences are drawn in the nonmovant's favor." *Toscano*, 258 F.3d at 983.

If Plaintiffs have only circumstantial evidence of conspiracy, Defendants can rebut the "allegation of conspiracy by showing a plausible and justifiable reason for its conduct that is consistent with proper business practice." *Id.* at 1094 (*quoting Richards v. Neilson Freight Lines*, 810 F.2d 898, 902 (9th Cir. 1987)). At that point, the burden shifts back to Plaintiffs to provide "specific evidence tending to show that the defendant was not engaging in permissible competitive behavior." *Id.* We consider the evidence individually and as a whole to determine if it tends to exclude the possibility of legitimate and independent conduct. *Id.* at 1094-1106.

B. Plaintiffs' Evidence as to SRI

Plaintiffs devote less than two pages in opposition to this issue, and provide no citations to the record. Yet, among other things, Plaintiffs filed four volumes of materials totaling 1,054 pages.[6] Plaintiffs' only citations in the moving papers appear in a "factual background" on the separate issue of whether Equilon and Motiva are sufficiently integrated to avoid per se or quick-look liability. As a result, most of Plaintiffs' arguments and evidence do not relate to whether SRI specifically and consciously intended to conspire with Shell and Texaco in the Western United States.

---

[6] Defendants submitted fourteen volumes. Hereinafter, where applicable, we cite submissions by volume, tab, and page number.

1. Plaintiffs' Initial Burden

Plaintiffs have no direct evidence that SRI conspired to fix prices. Rather, Plaintiffs argue that the circumstantial evidence taken as a whole establishes SRI was a co-conspirator. Equilon and Motiva allegedly:

> were formed as part of a single, unbroken series of negotiations among Shell, Texaco, and SRI to create The Alliance, in which all three shared. After its formation, The Alliance developed a Strategic Marketing Initiative, pursuant to which price-fixing was implemented Alliance-wide in the name of "price optimization," all of which was well-known to the Members Committees of Equilon and Motiva, where SRI was represented by Saudi Aramco executives.[7]

Joint Argument, p. 55 (footnote added).

Plaintiffs have no established that SRI participated in the overall formation of a price-fixing "Alliance." As proof that Motiva was the "culmination" of Defendants' negotiations, Plaintiffs cite "agreements entered into by defendants in connection with the formation of" Equilon and Motiva. Pls.' Fact ¶¶ 2-3; Shulman Decl. ¶¶ 6-7 (referring to Pls.' Vol. 1, Tabs 2-3). For example, the Equilon Master Agreement mentions that Shell, Texaco and SRI were in negotiations for the creation of "Eastco" (the name initially anticipated for Motiva). Pls.' Vol. 1, Tab 3, p. 27. Similarly, the Motiva Master Agreement mentions that Shell and Texaco had already formed Equilon. *Id.* at p. 82. However, references to potential future agreements or prior agreements do not

[7] Plaintiffs refer to Saudi Aramco in an effort to strengthen the alleged connection between SRI and the purported nationwide conspiracy. Pls.' Facts ¶¶ 1, 18, 19, 31. Upon our review, again without the benefit of specific citations to page and line numbers, we found the evidence touching upon Saudi Aramco only relates to the formation of Motiva, the unwinding of Star, and the assumption by Motiva of Star's obligations. *See id.* The evidence does not, as Plaintiffs argue, raise an inference that Saudi Aramco directed or instructed SRI to participate in an illegal scheme in the Western United States.

reveal an intent to engage in price fixing or an illicit conspiracy. Such references are equally consistent with legitimate conduct and sound document drafting.[8]

In addition, a short-hand name adopted after formation, "The Alliance," does not reveal a pre-formation intent to conspire. *See* Joint Arg. p. 55; Pls.' Fact ¶ 4. The name does not tend to exclude the possibility of legitimate coordination, such as for the purpose of protecting the Shell and Texaco brands. *See Richards v. Neilsen Freight Lines*, 810 F.2d 898, 903 (9th Cir. 1987) (affirming summary judgment and rejecting testimony about a "gentlemen's agreement" as circumstantial evidence of a conspiracy since it was equally consistent with legitimate conduct).

Moreover, Plaintiffs have not adequately shown how the Strategic Marketing Initiative reveals an intent by SRI to conspire as to the Western United States. *See* Joint Arg. p. 55; Pls.' Facts ¶ 37. Plaintiffs' evidence shows that the exchange of information occurred for the purpose of promoting the Shell and Texaco brands. Since Equilon and Motiva rely on the Shell and Texaco brands to market gasoline, they have a mutual and legitimate interest in protecting them. An agreement to protect brands does not reveal an intent to illegally fix prices, let alone an intent by SRI to do so in the Western United States.

In any event, Plaintiffs never explain why SRI would have any interest in participating in a conspiracy to fix prices in the Western United States. SRI has no apparent motive to conspire with Shell and Texaco with respect to Equilon and the Western United States because Equilon and Motiva operate in different regions of the country. SRI also does not share in Equilon's profits and does not itself operate in the Western United States, Joint Facts ¶ 43, so SRI would not benefit from any potential anticompetitive effects in Equilon's territory.

[8] Plaintiffs also cite deposition testimony, none of which tends to implicate SRI.

Therefore, Plaintiffs' circumstantial evidence does not tend to exclude the possibility of legitimate conduct on the part of SRI. As Plaintiffs failed to come forward with sufficient evidence to satisfy their initial burden of proving a § 1 conspiracy, SRI is entitled to summary judgment as a matter of law.

2. SRI's Plausible and Justifiable Reason

Assuming Plaintiffs' satisfied their initial burden, Defendants identified $800 million in potential savings from the formation of Equilon and Motiva, $250 million attributable to Motiva. Joint Facts ¶ 39. Though perhaps optimistic, Plaintiffs do not contend these numbers were fabricated. Nor do Plaintiffs claim that the anticipated savings resulted from a haphazard or cursory evaluation process. Consequently, the undisputed evidence shows that SRI had a plausible and justifiable reason for forming Motiva. The burden now shifts to Plaintiffs to present specific evidence tending to exclude the possibility of legitimate or independent conduct by SRI.

3. Plaintiffs' Specific Evidence

Even if we construe Plaintiffs' evidence as overcoming the initial threshold, we find no specific evidence that tends to show SRI consciously committed itself to engage in a conspiracy that included the Western United States. Nor does the evidence raise doubts as to SRI's claimed reason for participating in the formation of Motiva.

C. Summary of Evidence

Plaintiffs lack direct or circumstantial evidence "sufficiently unambiguous to permit a trier of fact to find that [SRI] conspired" to fix prices in the Western United States absent "any apparent motive to do so." *Matsushita*, 475 U.S. at 597. Viewing the evidence in the light most favorable to Plaintiffs, we find no triable issue of fact regarding whether SRI participated in an illegal conspiracy to fix prices in the Western United States in violation of § 1

of the Sherman Act. Therefore, SRI is entitled to summary judgment as a matter of law.

VI. Disposition

SRI's Motion for Summary Judgment on the issue of antitrust standing is **GRANTED**.

IT IS SO ORDERED.

Dated: 5/21/02

/s/ George H. King
GEORGE H. KING
United States District Judge

[Filed Aug. 13, 2002]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FOUAD N. DAGHER, et al.,	)	CV 99-6114-GHK (JWJx)
Plaintiffs,	)	
v.	)	MEMORANDUM AND ORDER RE: CROSS MOTIONS FOR SUMMARY JUDGMENT (PART TWO: Re: § 1 PER SE & QUICK-LOOK LIABILITY)
SAUDI REFINING, INC., et al.	)	
Defendants.	)	

I. Introduction

This matter is before the court on the parties' cross-motions for summary judgment. The motions came on regularly for hearing on December 10, 2001. On May 21, 2002, we issued an order with respect to Plaintiffs' standing against SRI. We hereby adopt Sections II (Procedural History), III (Undisputed Facts), IV (Summary Judgment), and V.A (Antitrust Conspiracy Cases) of that May 21, 2002 order. We now rule on the remaining issues after considering the joint briefs, all pertinent papers, the evidence, and oral argument:

II. Per se and/or Quick-Look Antitrust Liability

The parties divide per se and/or quick-look liability into two subissues: (1) "Are Equilon and Motiva integrated such that SRI, Shell and Texaco are not subject to per se or "quick look" liability?" (2) "Are Equilon's and Motiva's claimed efficiencies sufficient such that SRI, Shell and Texaco are not subject to per se or quick look liability?" Joint Argument at i.

The parties appear to have borrowed this formulation from language in our Rule 12(b) (6) order. At that stage, we accepted Plaintiffs' allegations as true and identified any possible factual basis for § 1 per se or quick-look liability. That categorical framework is not as helpful at the summary judgment stage. We can now analyze the relevant legal principles in the context of a significant body of evidence.

In light of the admitted cost savings and significant commitment of resources into what appear to be legitimate joint ventures, Joint Fact ¶¶ 39, 48, we address two ultimate questions: (1) whether a reasonable trier of fact could conclude that Equilon and Motiva are either mere window-dressings for a price fixing conspiracy or (2) whether they are otherwise patently anticompetitive.

Since Plaintiffs waived any reliance on the rule of reason, we will not weigh all of the claimed benefits and purported anticompetitive effects to determine if the anticompetitive effects predominate. *See, e.g., Cal. Dental Ass'n v. FTC*, 224 F.3d 942, 947 (9th Cir. 2000); *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001) (describing shifting burdens under rule of reason). The question is not whether Defendants violated § 1, but whether their conduct falls under the exceptional § 1 per se or quick-look doctrines. Moreover, Plaintiffs abandoned the per se or quick-look theory of market division.

A. Per se Analysis

To establish per se liability, Plaintiffs must do more than prove that Equilon and Motiva "more likely than not" affected competition negatively. *Am. Ad Mgmt. v. GTE Corp.*, 92 F.3d 781, 787 (9th Cir. 1996). The "per se approach can only be applied to an agreement which 'facially appears to be one that would almost always tend to restrict competition and decrease output.'" *Id.* (*quoting NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 100 (1984)); *see also Eichorn v. AT&T Corp.*, 248 F.3d 131, 138 (3d Cir. 2001) ("[O]n its face, [it] has 'no purpose except

stifling competition.'"). Stated another way, if the conduct "does not invariably have anticompetitive effects," we will not condemn it under a per se analysis. *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 & n.16 (1978); *see also* 1 Von Kalinowski et al. Antitrust Laws and Trade Regulation § 13.04, at 13-21 (2d ed. 1996).

For example, true price fixing is so "plainly anticompetitive, and so lacking in "any redeeming virtue," that we automatically condemn such arrangements as presumptively unreasonable. *BMI v. CBS*, 441 U.S. 1, 8 (1979); *NCAA*, 468 U.S. at 100; *see also Eichorn*, 248 F.3d at 142-43. Courts have repeatedly treated horizontal price fixing among competitors as per se violations. *Big Bear Lodging Ass'n v. Snow Summit, Inc.*, 182 F.3d 1096, 1011 (9th Cir. 1999).

However, the concept of "price fixing" cannot be applied literally. *BMI*, 441 U.S. at 9. Price fixing "will often, but not always, be a simple matter." *Id.* "When two partners set the price of their goods or services they are literally 'price fixing,' but they are not per se in violation of the Sherman Act." *Id.* Efficient joint ventures often entail agreements on prices and output as well as restrictions on competition, yet do not violate the prohibition against price fixing.' *See* XI Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ("Hovenkamp") ¶ 1908, at 229-30 (1998).

If an agreement arguably promotes efficiency or productivity at the time adopted, we should apply the rule of reason and perform a more discriminating assessment. *Polk Bros., Inc. v. Forest City Enters.*, 776 F.2d 185, 189 (7th Cir. 1985). For example, competitors should be free to combine resources to create products that each could not develop alone. *See BMI*, 441 U.S. at 23. The joint operation may administratively require former competitors to set a single price, but this does not indicate a naked price fixing restraint.

The price fixing is "merely ancillary to the main purpose" of producing the new product. *See id.*

Thus, the per se rule is less likely to apply when an agreement to set prices or impose some other restraint is part of a joint venture "in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit." *Ariz. v. Maricopa County Med. Soc'y*, 457 U.S. 332, 356-57 (1982); *see also Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984) (noting joint ventures are usually subject to rule of reason analysis since they unlock potential efficiencies); *Addamax Corp. v. Open Software Distrib.*, 152 F.3d 48, 52 (1st Cir. 1998) ("Joint venture enterprises . . . unless they amount to complete shams, are rarely susceptible to per se treatment."); XIII Hovenkamp ¶ 2100g, at 14 ("In our relatively open market system we begin with the premise that joint productive activity is socially valuable and it is not antitrust's job to 'approve' joint ventures.").

Because per se violations settle the question of liability without any inquiry into anticompetitive impact, the Supreme Court has cautioned against expanding the per se rule to new business arrangements with which we have little experience. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (*citing Fed. Trade Comm'n v. Ind. Fed'n of Dentists*, 476 U.S. 477, 458-59 (1986)). "Where the conduct at issue is not garden-variety . . ., we have eschewed a per se rule and instead have utilized a rule of reason analysis." *Metro Indus. v. Sammi Corp.*, 82 F.3d 839, 844 (9th Cir. 1996); *see also Am. Ad Mgmt.*, 92 F.3d at 784. As a result, when conduct falls outside typical per se categories of "horizontal price fixing, division of markets, group boycotts, tying arrangements, and output limitations," we generally apply a rule of reason analysis. *See Am. Ad Mgmt.*, 92 F.3d at 784; *Big Bear Lodging Ass'n*, 182 F.3d at 1011.

B. Quick-Look Analysis

Conduct outside the narrow per se categories can be condemned short of a full rule of reason analysis if "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999). Much like per se treatment, quick-look analysis applies "when the great likelihood of anticompetitive effects can easily be ascertained." *Id.* Our experience with such combinations must be so clear that we can confidently conclude the principal result will be anticompetitive. *Id.* at 781. If the potential anticompetitive effects are "far from intuitively obvious," we resort to a complete rule of reason analysis. *Id.* at 759.

C. Initial Assessment of Evidence[1]

Several undisputed facts appear to foreclose the conclusion that Equilon and Motiva are nothing but window-dressings for an old-fashioned price fixing cartel or are otherwise patently anticompetitive. Though the parties dispute the exact extent of integration, both ventures control significant refining and marketing assets. *See* Joint Facts ¶ 48. Both entail risk sharing based on the Defendants' respective capital investments. *Id.* ¶¶ 43, 47; *see also Maricopa County*, 457 U.S. at 356-57. Both have in fact achieved cost savings, Pls. ' Facts ¶¶ 39-41, and each manufactures and markets branded gasoline. Joint Facts ¶¶ 10, 42, 45, 53. In other words, Equilon and Motiva have achieved their parents' stated goals. On its face then, the undisputed evidence shows potential and realized efficiencies occurring within functioning and integrated enterprises.

[1] The parties address per se and quick-look together in their analysis. We do the same to avoid needless repetition and because the principles are substantially similar. *See Cal. Dental. Ass'n*, 526 U.S. at 779.

Plaintiffs contend that every combination, whether efficient or anticompetitive, realizes cost savings from "closing offices, eliminating positions, and avoiding capital expenditures . . . ." Joint Argument at 25-26. Plaintiffs argue that Defendants cannot avoid per se or quick-look liability by identifying cost savings alone. However, businesses regularly combine resources to realize cost savings through elimination of redundant workers, capital, and overhead expenses. *See, e.g.*, Fed. Trade Comm'n and U.S. Dep't of Justice, 1992 Horizontal Merger Guidelines § 4 (revised April 8, 1997); XIII Hovenkamp ¶ 2100, at 4, ¶ 2121b, at 117. So long as the newly formed business maintains a comparable level of production, it makes more efficient use of the remaining resources. Here, we have no evidence that Defendants decreased their overall level of production after forming Equilon and Motiva.

In any event, the undisputed evidence shows that Defendants anticipated operating efficiencies beyond cost savings alone. Defendants predicted that Equilon and Motiva would benefit from greater economies of scale. *See, e.g.*, Vol. 2, Tab 3 at 35; Vol. 3, Tab 25 at 820-21. The physical proximity of some refineries meant Defendants could improve overall efficiency through, among other things, the sharing of inputs and transportation costs. *See, e.g.*, Defs.' Vol. 1, Tab 11 at 242, Tab 12 at 280; Vol. 2, Tab 19 at 454; Vol. 3, Tab 25 at 819, 844. Defendants also expected to tap into the capacity of previously unused pipelines, simultaneously eliminating the need to rely on third-party carriers. *See, e.g.* Defs.' Vol. 3, Tab 25 at 854, Tab 35 at 1205. Though in some instances Defendants expected to close refineries, those refineries were operating well below capacity, allowing Defendants to increase the efficiency of the remaining ones. *See, e.g.*, Tab 25 at 843, Tab 29 at 971.

In addition to improved use of physical resources, Defendants anticipated economic benefits from an expanded knowledge base. They anticipated reductions in the number

of plant failures from exchanges regarding best practices. *See, e.g.*, Defs.' Vol. 3, Tab 25 at 791, 822-23. Defendants also could share knowledge and technologies acquired through research and development programs. *See, e.g., id.* at 809. Consequently, the claimed savings from forming Equilon and Motiva did not relate solely to the elimination of redundant costs.

Plaintiffs next argue that all such cost savings and efficiencies are legally irrelevant in the context of anticompetitive combinations. Joint Argument at 26. However, this argument takes for granted the existence of a per se or quick-look violation.[2] Unless and until Plaintiffs establish a per se or quick look violation, such as price fixing, we cannot categorically ignore identified and realized efficiencies. *See, e.g., Copperweld*, 467 U.S. at 768; *Polk Bros.*, 776 F.2d at 189.

D. Plaintiffs' Arguments

1. Plaintiffs' Price Fixing Theory

Plaintiffs approach the question of price fixing too literally. Though Equilon and Motiva charge different prices for Shell and Texaco branded gasoline, according to Plaintiffs, both "fix" prices because each has decided to price the brands together. As a hypothetical, Equilon may sell Shell and Texaco branded gasoline for $1.50 a gallon. while Motiva sells the same gallon for $1.75, but both "fix" prices because, whatever price they charge, each prices Shell and Texaco branded gasolines the same.

Plaintiffs' theory would impose artificial and unnecessary requirements on joint ventures. Whether Equilon and Motiva charge the same or different prices for both brands,

[2] Moreover, Plaintiffs rely on § 2 monopoly cases for this proposition of law. In § 2 cases, cost savings and efficiencies are irrelevant because we are concerned with the dangers inherent in overwhelming market power. Plaintiffs have not brought a § 2 claim. *See* XIII Hovenkamp ¶ 2101, at 17 ("[J]oint ventures are analyzed under the 'restraint of trade' standard rather than the monopoly standard.").

each literally "fixes" a price where Defendants formerly set prices independently. Yet they and every other joint venture must, at some point, set prices for the products they sell. *See BMI*, 441 U.S. at 9.

Because almost any price setting constitutes price fixing under Plaintiffs' theory, Defendants would violate § 1 per se even if Equilon and Motiva had absolutely no connection to or interaction with each other. To avoid price fixing according to Plaintiffs' theory, Shell, Texaco and SRI would have to independently price the branded gasoline for Equilon or Motiva. While this may be possible temporarily, or in particular circumstances, there is no basis for imposing such an artificial arrangement indefinitely as a matter of law.[3] "[A] producer is free to fix and publish a retail price for his product and solicit business at that price." *See Dunn v. Phoenix Newspapers, Inc.*, 735 F.2d 1184, 1187 (9th Cir. 1984).

Plaintiffs would only allow joint ventures to establish prices for products that were somehow fundamentally new or different from those made by the parents. Requiring joint ventures to invent fundamental new products to operate independently or justify their existence would eliminate several types of efficient and pro-competitive combinations. Companies regularly combine assets for the legitimate purpose of realizing cost savings through economies of scale and information exchange, not only to develop new products.

In addition, Plaintiffs' price fixing theory is contrary to the undisputed facts. One person at Equilon and one person at Motiva set prices for both brands according to market

[3] At oral argument, Plaintiffs pointed out that Equilon and Motiva at least temporarily relied on their parents' former pricing systems. Equilon and Motiva apparently relied on the old pricing systems until new ones could be developed. Developing a new system would be one of the challenges faced by the joint ventures as they combined the considerable assets of their parents. The fact they temporarily relied upon the old systems does not explain why, as a matter of law, they should be required to do so indefinitely.

conditions within their respective territories. Joint Facts ¶¶ 18-21, 62-63. Shell, Texaco and SRI did not jointly agree pre- or post-formation on one universal price that would be applied nationally through Equilon and Motiva. Furthermore, they had no reason to fix prices because once Equilon and Motiva were formed, Shell, Texaco and SRI no longer competed in the market for Shell and Texaco branded gasoline, either amongst themselves or against the ventures in the United States. Equilon and Motiva operate in different regions of the country and thus also do not compete against each other. *Id.* ¶¶ 42, 45, 62-63. A decision by Equilon to raise prices throughout the West Coast would not enable Motiva to raise prices on the East Coast.

Plaintiffs' theory has less to do with price fixing than with combinations in general. In essence, Plaintiffs seek per se or quick-look treatment because of the loss of a competitor. With few exceptions, Plaintiffs' theory would act as a per se rule against joint ventures between companies that produce competing products. Every such venture deprives the market of a competitor to the extent that where there were two or more entities producing a product, now there is one. Because of this, and the reasons stated above, we decline to adopt Plaintiffs' theory of price fixing.

2. Equilon and Motiva as Shams

As an alternative to their per se price fixing theory, plaintiffs contend the ventures have an overall and presumptively anticompetitive purpose or structure. We address Plaintiffs' numerous arguments on this subject individually and then as a whole.

a. Pre-formation Conduct and Decisions

i. Regulatory Review and Confidentiality Agreements

According to Plaintiffs, Defendants from the outset expected that any combination would be subject to regulatory review. Pls.' Facts ¶ 14. They executed confidentiality agreements, which included provisions to

return or destroy information exchanged during the discussion/negotiation stage. *Id.* ¶ 15. Defendants purportedly failed to produce confidential documents exchanged during negotiations for government regulators. *Id.* ¶ 17. Thus Plaintiffs argue Defendants must have had an anticompetitive purpose.

Given Defendants' size, the nature of the oil industry, and the magnitude of the contemplated ventures, any business person would anticipate regulatory review. Defendants' foresight proves nothing. Second, confidentiality agreements serve an important business purpose. They protect sensitive financial information from dissemination or misuse by competitors, while enabling companies to explore potential collaborative efforts.

Withholding information from regulators could suggest an illegitimate motive. *Id.* ¶ 17. However, Plaintiffs have no evidence that Defendants concealed documents. Plaintiffs cite two depositions: one deponent states she has no knowledge on the matter, Pls.' Vol. 2, Tab 17, at p. 356, and the other was not asked about the production of documents for regulators, *id.* at pp. 358-60. Without such evidence, Plaintiffs have failed to make any showing of an anticompetitive purpose based on the confidentiality agreements.

ii. Exclusion of Assets

Plaintiffs claim the exclusion of various assets from Equilon and Motiva reveals that Defendants never intended Equilon or Motiva to operate as integrated joint ventures. However, the purpose of joint ventures is to combine particular productive assets without undertaking complete mergers. *See, e.g.*, Fed. Trade Comm'n and U.S. Dep't of Justice, Antitrust Guidelines for Collaborations Among Competitors § 1.1, at 2, § 3.2, at 8 (April 2000) ("Antitrust Guidelines"). To realize the full benefits of a joint venture,

the parents must of necessity exclude unrelated assets.[4] As always, the parents attempt to allocate resources where they will be most productive.

Here, Defendants formed Equilon and Motiva for the purpose of combining their downstream refining and marketing operations for branded gasoline. Joint Facts ¶¶ 12, 31, 33, 36, 39, 40, 42, 45, 45. They did not include their worldwide businesses, upstream operations, marine fuels, aviation fuels, or chemical production plants, if any, because those assets and entities are not part of Defendants' downstream operations in the United States.

When selecting which assets to include in a joint venture, a parent company may reserve assets that serve vital functions in other businesses. Here, Defendants did not transfer ownership of the Shell and Texaco brands to Equilon and Motiva because they rely on those brands in other businesses around the globe. Because of the brands' international importance and value, forcing Shell and Texaco to transfer the brands to Equilon or Motiva is akin to requiring them to choose between merging or abandoning any joint venture. Joint venture parents are not required to abandon or devalue long-standing investments in brand good-will to avoid per se or quick-look condemnation. Furthermore, Equilon and Motiva have an exclusive right to license Shell and Texaco branded gasoline in the United States. Defs.' Fact ¶ 47, which is more than sufficient to enable each to fulfill its purpose.

A joint venture parent may also exclude assets because of prior commitments. In this case, the uncontroverted evidence is that Shell could not contribute Deer Park because it was a joint venture with PEMEX—the Mexican national oil company—and PEMEX rejected the proposal. Pls.' Facts

[4] To the extent Plaintiffs believe *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969), requires complete mergers, we disagree. *Citizen Publishing* did not "prevent all forms of joint operation." *Id.* at 135; *see also infra* Section II.D.3.

¶ 22 (Defs.' Response); Defs.' Facts ¶ 44. This is a legitimate reason for excluding Deer Park. Moreover, Shell's inability to include Deer Park explains why Texaco and SRI received the right to operate one comparable refinery independently. Pls.' Facts ¶ 27 and Defs.' Response. In any event, Plaintiffs have not explained how the exclusion of one relevant asset renders either Equilon or Motiva a sham. No reasonable trier of fact could conclude that the exclusion of Deer Park under these circumstances demonstrates that the joint ventures were shams designed to conceal price fixing.

iii. SRI's Ability to Compete Against Equilon

Since the formation of Equilon and Motiva, SRI has remained free to compete against Equilon. Joint Facts ¶ 60. This right, however, does not indicate that Equilon and Motiva are shams. It would be unnecessary to limit SRI's ability to compete against Equilon since SRI held no financial stake in Equilon. Given the absence of any financial connection between SRI and Equilon, an agreement restricting SRI'S ability to compete in the Western United States might instead raise an inference of improper collusion.

iv. "Sole Risk" Provisions

Plaintiffs consider the presence of "sole risk" provisions evidence that Defendants still compete in the downstream market in the United States, and thus the ventures' only purpose was to drive up prices. To the contrary, the presence of "sole risk" provisions bolsters our initial conclusion that Equilon and Motiva are not patently anticompetitive. The "sole risk" provisions permit Defendants to engage in refining opportunities[5] rejected by either Equilon or Motiva. Defs.' Response to Pls.' Facts ¶ 25. Rather than unnecessarily constrain competition, this ensures efficient allocation of resources and promotes beneficial competition.

[5] The "sole risk" provisions apply to refining, not marketing.

If Shell, Texaco or SRI perceives an opportunity where Equilon and Motiva do not, market principles dictate that they should be free to invest accordingly.

v. Brand Management Protocol

At the time Equilon and Motiva were formed, Defendants entered into Brand Management Protocol agreements. For example, Motiva's Brand Management Protocol "recognize[s] that coordination between Equilon and [Motiva] of uniform standards established by Texaco for the Texaco Symbols and by Shell for the Shell Symbols . . . enhances and protects the value, reputation, prestige and goodwill associated with" those symbols and brands. Pls.' Vol. 1, Tab. 3 at 141. The Protocol agreements regulate the use of the Shell and Texaco brands in the ventures' respective regions. *See id.* at p. 140. Plaintiffs view these agreements as evidence of Defendants' intent to eliminate competition.

The Brand Management Protocol agreements do not reveal an invidious anticompetitive purpose. Defendants had a mutual and legitimate interest in promoting both brands since they were the principal method for marketing Equilon's and Motiva's products. Since Defendants chose not to merge, they adopted a program to ensure that Equilon's and Motiva's use of the brands would not diminish their value in the United States or abroad.

An agreement defining and regulating acceptable practices for brands does not invariably result in anticompetitive harms. Nor does it reveal a patently anticompetitive purpose. As such, these agreements do not validate Plaintiffs' position.

vi. Ease of Dissolution

Plaintiffs assert that Equilon and Motiva can be "easily unraveled and dissolved," providing evidence that neither was intended to operate as a productive and integrated economic collaboration. Joint Argument at 17.

Equilon and Motiva are not "fly-by-night" operations. Defendants negotiated for over a year before forming Equilon and Motiva, Joint Facts ¶¶ 6-7, 33-34, which would be unnecessary if they simply intended to fix prices. Plaintiffs do not suggest that the negotiations leading up to the formation of Equilon and Motiva were perfunctory or that Defendants failed to undertake adequate due diligence regarding the potential costs or benefits of formation.

In addition, the right to dissolve Equilon and Motiva upon mutual consent must be evaluated alongside the substantial financial commitments made when forming the ventures. Equilon and Motiva control numerous refineries, lubricant plants, research laboratories, terminals, thousands of service stations, miles of pipeline, and employees. *Id.* ¶ 48. If Defendants wanted the ability to readily dissolve Equilon and Motiva, they would not have entrusted the ventures with such extensive resources. The significant integration of assets itself suggests that Defendants intended Equilon and Motiva to function as true joint ventures, rather than covers for price fixing. In any event, joint venture agreements frequently provide for dissolution upon mutual consent. The presence of such clauses does not indicate an intent to illegally fix prices.

Other than by mutual consent, Equilon and Motiva can only be dissolved after five years, effective two years after notice. *Id.* ¶ 51. A five-year minimum with two-years notice would allow Defendants to move forward with Equilon and Motiva, hopefully recouping their investments, while leaving room should changes occur in the market or Defendants' individual circumstances.[6] Five years represents a significant commitment to the future of Equilon and Motiva.

---

[6] Plaintiffs allege that Texaco is currently negotiating its withdrawal from the "Alliance, necessitated by Texaco's agreement to be acquired by Chevron." Joint Argument at 17. Chevron's acquisition of Texaco, resulting in Texaco's need to withdraw, serves as an example of why joint venturers provide for dissolution upon consent or reasonable notice.

Consequently, the above-described dissolution provisions are not per se illegal, and we do not see how an observer with only a rudimentary understanding of economics could view them as presumptively anticompetitive, especially in light of the time, effort, and resources invested into Equilon and Motiva. *See Cal. Dental Ass'n*, 526 U.S. at 770.

b. Post-formation Conduct

i. Members Committee Meetings

Plaintiffs believe that Defendants "govern" Equilon and Motiva through Members Committees, presumably to carry out their price fixing conspiracy. Pls.' Facts ¶ 30. The Members Committee for Equilon consists of four Shell representatives and three Texaco representatives. *Id.* Motiva's Members Committee consists of two representatives from Shell, Texaco and SRI. *Id.* The Members Committees set "policies, business plans, and budgets" for the CEOs and officers running the ventures. *Id.* ¶ 32. Representatives on the Equilon and Motiva Members Committees have separate staffs at their own companies. *Id.* ¶ 42.

To begin, Defendants had a legitimate interest in forming Members Committees to protect their substantial investments in Equilon and Motiva. In fact, it would be difficult to conceive of another method of management of a joint venture where the parents wish to maintain an actual, not passive, role in the advancement of their mutual interests.

Even assuming the same representatives from Shell and Texaco served on both committees, we cannot infer a conspiracy merely because Plaintiffs identified an opportunity to conspire. *In re Citric Acid Litig.*, 191 F.3d 1090, 1103 (9th Cir. 1999) (refusing to "infer participation in the conspiracy from the opportunity to do so. Such meetings, at least in and of themselves, do not tend to exclude the possibility of legitimate activity."). The existence of Members Committees does not tend to exclude the equally likely inference of legitimate conduct, such as to protect and

promote the Defendants' shared interest in the Shell and Texaco brands.

ii. Relationship Between Pricing & Purpose

Plaintiffs claim the practice of pricing Shell and Texaco brands the same is not sufficiently related to the joint ventures' beneficial efficiency-producing activities. Joint Argument at 26-28; Pls.' Facts ¶¶ 45, 47. Plaintiffs argue that since Defendants did not identify any cost savings related to pricing at the time of formation, they had no reason for subsequently pricing both brands the same, except to raise prices. *Id.*

The fact that Defendants did not identify cost savings related to pricing at the time of formation does not negate the other substantial savings and efficiencies anticipated from formation. Antitrust law does not require every business decision to generate additional identifiable savings to survive per se or quick look scrutiny. Plaintiffs also do not explain how the decision to set the same price for Shell and Texaco branded gasoline after formation is inconsistent with permissible business practices.

Defendants offer a plausible and justifiable reason why Equilon and Motiva would independently choose to set the price of Shell and Texaco branded gasoline the same: from the perspective of the ventures, the products are fungible. While the brands appeal to different customers, Joint Facts ¶ 66, and contain different additives, Pls.' Fact ¶ 46, Plaintiffs provide no evidence that the costs of producing the brands, whether related to physical production, marketing, or advertising, would lead an efficient venture to set different prices for Shell and Texaco branded gasoline.

iii. Parallel Pricing

Plaintiffs assert that "[w]ithin a relatively short time after their formation, Equilon and Motiva implemented a practice of charging the same price for the Shell and Texaco brands of gasoline in each of the pricing areas into which Equilon

and Motiva had divided their geographic spheres of operation." Pls.' Facts ¶ 36. "Parallel pricing is a relevant factor to be considered along with the evidence as a whole; if there are sufficient other 'plus' factors, an inference of conspiracy can be reasonable." *In re Citric Acid*, 191 F.3d at 1102.

This is not a case of parallel pricing. Equilon and Motiva do not charge identical prices across the country, and the evidence does not reveal an agreement about what prices the other should charge. The parties stipulate that one person at Equilon sets prices for Equilon's territory, one person at Motiva sets prices for Motiva's territory, and each sets prices based on local market conditions. Joint Facts ¶¶ 62, 63.[7]

The conduct in question is consistent with the practical consequences of forming Equilon and Motiva. Once formed, Equilon and Motiva had the power to establish any price for their products, just as any other business does, without collaborating with each other or Defendants. It is arbitrary to infer a conspiracy from the decision to charge the same versus different prices for both brands, since in any event, Equilon and Motiva produce both products and receive all of the revenues. In effect, Plaintiffs want the joint ventures to charge different prices for the brands and thus compete against themselves. "[Y]et no law requires competition within a company." *See Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 56 (1st Cir. 2002).

Furthermore, Plaintiffs have failed to overcome an additional burden. If the intent and plan to "fix" prices arose after formation, one cannot immediately assume that Defendants consciously committed themselves to such a scheme either pre- or post-formation. We are not suggesting,

[7] At most, Defendants have exchanged information relating to the marketing of Shell and Texaco branded gasoline. However, information exchange is not per se illegal. *United States Gypsum Co.*, 438 U.S. at 440-41 & n.16. Some information exchange between Equilon and Motiva is necessary to protect and develop the jointly shared brands as resources.

as Defendants do, that the post-formation conduct of Equilon and Motiva can never be considered evidence of pre-formation anticompetitive intent. *See* Joint Argument at 44-48 *(citing Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984)). *Copperweld* did "not consider under what circumstances, if any, a parent may be liable for conspiring with an affiliated corporation it does not completely own." 467 U.S. at 767; *see also Fraser* 284 F.3d at 56-60 (rejecting argument that LLC members could not violate § 1 when the only complained of conduct occurred post-formation). But just as we do not attribute the acts of a subsidiary to a parent in other contexts, after a certain point it would be improper to attribute the post-formation conduct of Equilon or Motiva to Defendants for purposes of proving a § 1 conspiracy absent other evidence that the ventures are shams.[8]

In this case, Equilon and Motiva had a separate and legitimate reason for pricing Shell and Texaco branded gasoline the same - they were fungible. *See supra* discussion. Like any other business, they may set prices for their products. *See Dunn v. Phoenix Newspapers, Inc.*, 735 F.2d 1184, 1187 (9th Cir. 1984).

iv. Strategic Marketing Initiative and "Price Optimization"

According to Plaintiffs,

> Defendants implemented their price fixing in conjunction with a joint program called the Strategic Marketing Initiative, which was developed by Equilon, Motiva, and related service companies as an Alliance-wide program; [it] called for price fixing as a means of "price optimization"; and [it] was regularly reviewed with the Members Committees of both Equilon and Motiva.

[8] We recognize that a price fixing conspiracy offends §1 whether former competitors agree beforehand to fix prices immediately upon formation or agree to wait eight months after formation to raise prices. Here, Plaintiffs have not raised a triable issue of fact as to a price fixing conspiracy.

Pls.' Facts ¶ 37.

Plaintiffs reliance on the Strategic Marketing Initiative combines arguments we have already rejected. First, Plaintiffs rely on the theory that any setting of price by Equilon or Motiva constitutes "price fixing." If this were true, few joint ventures would survive § 1 scrutiny. Second, Plaintiffs attach significance to the fact that the Strategic Marketing Initiative was presented to the Members Committees for Equilon and Motiva. The fact Members Committees considered the same information does not automatically establish a nationwide conspiracy. *See In re Citric Acid*, 191 F.3d at 1103.

Plaintiffs also overlook the stated purpose of the Initiative, to develop the Shell and Texaco brands. Equilon and Motiva had a separate and legitimate interest in marketing the brands. Since Equilon and Motiva produce and market both brands, they have a legitimate reason to consider similar information and strategies. The Strategic Marketing Initiative, much like the Brand Management Protocol agreements, supports maintenance of the brands and their use by the ventures, something which we cannot lightly condemn as unavoidably anticompetitive. *See United States Gypsum Co.*, 438 U.S. at 440-41 & n.16.

v. Price Anomalies

Plaintiffs want us to assume an anticompetitive purpose or structure from the fact that Equilon and Motiva's wholesale prices rose when crude oil prices hovered around historic lows. Pls.' Facts '¶ 38.

If Equilon and Motiva were the only participants in the downstream market who raised prices during this period, one might suspect that they engaged in some type of anticompetitive collaboration. Yet we cannot determine whether all other downstream refiners also enjoyed higher wholesale prices despite the record low prices for crude oil. As a result, we might condemn Equilon and Motiva for

benefitting from a phenomenon experienced across the entire downstream market at that time.[9]

vi. Failure to "Pass" Savings onto Consumers

Plaintiffs accuse Defendants of never explicitly directing that cost savings be passed onto consumers. *Id.* ¶ 41. Companies are not required to "pass on" savings to consumers in the form of lower prices. Absent monopoly power or a proven anticompetitive restraint, every business has the legitimate option of passing savings onto consumers in the form of lower prices or to shareholders in the form of increased stock values. The decision to retain all or some of any realized savings does not raise a triable issue on Plaintiffs' contention that the ventures were created for the purpose of fixing prices or that they almost certainly had anticompetitive effects.

vii. Post-formation Cost Savings

Plaintiffs also complain that "The Alliance" eliminated duplicative or redundant expenses and avoided capital expenditures. Pls.' Facts ¶¶ 39, 40. The fact Defendants achieved cost savings bolsters one of their stated legitimate reasons for forming the ventures. The fact they actually commenced such programs indicates Equilon and Motiva were not simply fronts for an illegal conspiracy or combination. Hence, this provides no basis for inferring an anticompetitive purpose.

c. Summary

After carefully reviewing and considering Plaintiffs' evidence and arguments, and drawing all reasonable

---

[9] Even if we assume Equilon and Motiva controlled over twenty-five (25) percent of the branded gasoline in specific markets, Pls.' Facts ¶ 33, we have no evidence that Equilon and Motiva contributed to the *national* rise in wholesale prices. Even in a concentrated market, "rising prices do not themselves permit an inference of a collusive market dynamic." *See Brooke Group Ltd. v. Brown & Williamson Tobacco Co.*, 509 U.S. 209, 236-37 (1993).

inferences in Plaintiffs' favor, we nonetheless conclude a reasonable trier of fact could not find that Defendants formed Equilon and Motiva merely to achieve an ulterior anticompetitive purpose or that the ventures are patently anticompetitive. None of the conduct identified by Plaintiffs is of the type that "always tend[s] to restrict competition and decrease output " *Am. Ad Mgmt.*, 92 F.3d at 787. Our conclusion is reinforced by the fact that Defendants shared risks based on capital contributions, *see Maricopa County Med. Soc'y.*, 457 U.S. at 356-57, and the fact that Equilon and Motiva achieved greater efficiency, productivity, and savings, *see Polk Bros., Inc.*, 776 F.2d at 189.

3. Citizen Publishing

Despite the evidence of efficiencies and savings, Plaintiffs believe we must follow *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969), and hold Defendants liable under the per se and/or quick-look doctrines. The defendants in *Citizen* formed a joint venture to sell and distribute newspapers, yet maintained separate news and editorial departments. *Citizen*, 394 U.S. at 134. The newspapers realized considerable savings from combining their circulation and advertising departments. *United States v. Citizen Publ'g Co.*, 280 F. Supp. 978, 982 (D. Ariz. 1968). In spite of the savings, the Supreme Court concluded the joint venture violated § 1 per se. *Citizen*, 394 U.S. at 135. In so doing, the Court relied primarily on three facts: the newspapers pooled profits according to a fixed ratio, agreed not to compete, and improperly divided the market for daily newspapers. *Id.*

The profit pooling and non-compete arrangements in *Citizen* differ in several substantial respects from those in the instant case. First, the defendants, the *Star* and the *Citizen*, were the only daily newspapers in Tucson, Arizona. *Id.* at 133. By joining their circulation and advertising departments, they eliminated all competition for daily papers in Tucson. *Id.* at 133-34. In contrast, Equilon and Motiva

continue to compete with several major oil companies in their relevant markets.

Second, the *Star* and the *Citizen* combined for the specific purpose of restricting competition and fixing prices. *Citizen Publ'g*, 280 F. Supp. at 993. Before forming the venture, the *Star* and the *Citizen* agreed to raise advertising rates within one year and in fact raised rates within that period. *Id.* at 982. The Supreme Court could safely presume anticompetitive harms since that was the express purpose from the outset. Without evidence of such an intent here, we cannot lightly ignore the legitimate and significant reasons offered by Defendants.

Third, the non-compete provision in *Citizen* was part of an agreement to divide the market for daily newspapers. It prohibited the *Star*, the *Citizen*, or any of their stockholders or executives from forming a competing daily newspaper in Pima County, the metropolitan area of Tucson. *Citizen*, 394 U.S. at 135-36. It effectively divided the market because there were only two competitors. *Id.* Here, Equilon and Motiva operate in diverse markets with several competitors. In addition, their non-compete provisions are not nearly as broad.[10]

Consequently, the three reasons supporting the *Citizen* Court's conclusion do not apply to Equilon and Motiva. Still, Plaintiffs note a possible organizational similarity between the joint venture in *Citizen* and Equilon and Motiva. The joint venture in *Citizen* priced, sold and distributed newspapers, yet the *Star* and *Citizen* maintained separate news and editorial departments. Equilon and Motiva market and refine gasoline, yet Shell and Texaco retain the ultimate rights to the Shell and Texaco brands and additives.

This organizational similarity, if any, does not compel per se condemnation. The joint venture in *Citizen* performed one

[10] Even if Defendants' non-compete clauses were analogous, Plaintiffs waived any right to recover under a § 1 theory of market division. Thus, this aspect of *Citizen* is inapposite.

aspect of producing newspapers, the physical printing and distribution, yet set prices and advertising rates as if it was responsible for all aspects of production. In this case, Equilon and Motiva have responsibility for purchasing necessary inputs and then refining and marketing Shell and Texaco branded gasoline. It is therefore appropriate that they set prices for Shell and Texaco branded gasoline.

To the extent other similarities may exist between the venture in *Citizen* and Equilon and Motiva, they do not justify per se condemnation. *Citizen* did not elaborate on its § 1 per se analysis, and Plaintiffs cite no authorities building upon this part of the analysis.[11] We are reluctant to hypothesize about its application given recent Supreme Court admonitions against expanding the scope of per se liability. *Khan*, 522 U.S. at 10 (*citing Ind. Federation of Dentists*, 476 at 458-59); *see also Sammi Corp.*, 82 F.3d at 844.

4. Summary of Per se / Quick-Look

We recognize that upon a full rule of reason analysis the anticompetitive effects attendant to the formation of Equilon and Motiva, if any, might outweigh the benefits Defendants realized in cost savings and efficiencies. However, Plaintiffs have eschewed an exhaustive rule of reason analysis. We conclude Plaintiffs have failed to raise a triable issue of material fact on either price fixing or the presumptively anticompetitive nature of Equilon and Motiva. As a result, Plaintiffs failed to raise a triable issue of fact as to Defendants' liability under the per se or quick-look doctrines.

III. Disposition

Accordingly, Defendants' Motion is **GRANTED** as Plaintiffs failed to raise a triable issue of fact as to per se or

[11] Congress overruled *Citizen* by statute as it applied to combinations between newspapers. *See Haw. Newspapers Agency v. Bronster*, 103 F.3d 742, 744 (9th Cir. 1996) (*citing* Newspaper Preservation Act, 15 U.S.C. §§ 1801-04 (1970)).

quick-look § 1 liability. Defendants' purported *Copperweld* defense is **DENIED** as moot. Plaintiffs' Motion is **DENIED**.[12]

IT IS SO ORDERED.

Dated: 8/13/02

/s/ George H. King
GEORGE H. KING
United States District Judge

[12] Plaintiffs carry the ultimate burden of proof at trial and have the burden of showing entitlement to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). Because we conclude they failed to even raise a triable issue of material fact, they cannot show entitlement to judgment as a matter of law.